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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARK HARTMANN, a minor by
his parents and next friends,
Roxanna and Joseph Hartmann,
ROXANNA AND JOSEPH HARTMANN,

Petitioners,

v.

LOUDOUN COUNTY BOARD OF EDUCATION,

Respondent.

**On Petition For a Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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95 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals applied the correct standard of review in holding that the district court failed to give "considerable deference" to administrative proceedings conducted pursuant to the Individuals with Disabilities Education Act

2. Whether the Court of Appeals incorrectly failed to apply the "clearly erroneous" standard of review in rejecting the district court's findings of fact.

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PETITION FOR A WRIT OF CERTIORARI

Mark Hartmann, a minor by his parents and next friends, Roxanna and Joseph Hartmann, and Roxanna and Joseph Hartmann petition this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review its order reversing and remanding for dismissal the decision of the federal district court.

OPINIONS BELOW

The Opinion and Order of the court of appeals reversing the district court decision and remanding the case for dismissal is reported at 118 F.3d 996 (4th Cir. 1997) A-1.[1] The Order (A-

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[1] References to the Appendix in this booklet are "A" followed by the page number; thusly "A-1."

18), the Memorandum Opinion (A-20) and the Supplemental Memorandum Opinion (A-39) of the district court are not officially reported. However, the Memorandum Opinion of the district court is unoffically reported at 24 Individuals with Disabilities Education Law Report (IDELR) 1171. The state administrative decision (A-41) is unofficially reported at 22 IDELR 833. The decision of the administrative due process hearing (A-47) is unofficially reported at 21 IDELR 1089.

JURISDICTION

The Order of the court of appeals was entered July 8, 1997. A-1. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Individuals With Disabilities Education Act ("IDEA")[2]

20 U.S.C. § 1415 Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include-

. . . . . .

(6) an opportunity to present complaints with respect to any manner relating to identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child;

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[2] The IDEA was amended by Congress and enacted into law on June 4, 1997. As a result the law was recodified in the United States Code. The references made herein are to the recodified IDEA.

. . . . . .

(f) Impartial due process hearing

(1) *In general*

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

. . . . . .

(g) Appeal

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such hearing may appeal such findings and decision to the State education agency. Such agency shall conduct an impartial review of such decision. The officer conducting the review shall make an independent decision upon the completion of such review.

. . . . . .

(i) Administrative procedures

(1) In general.

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2) of this subsection.

(*B*) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) *Right to bring civil action*

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements

In any action brought under this paragraph, the court

(i) shall receive the records of the administrative proceedings,

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

. . . . . .

(j) Maintenance of current educational placement

Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall with the consent of the parents, be placed in the public school program until such proceedings have been completed.

F.R.C.P. Rule 52 Findings by the Court; Judgement on Partial findings

(a) Effect . In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgement shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall

similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

STATEMENT OF CASE

This case presents the fundamental issue of the role of the federal district court in exercising its statutory duty pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(2)(A) and (B) (formerly § 1415(e)(2)) to receive the records of the administrative proceedings, to hear additional evidence at the request of the parties and based upon a preponderance of the evidence grant such relief as the court determines is appropriate.

The IDEA ensures that school age children with disabilities are provided special education services to meet their unique needs. It provides extensive procedural safeguards to insure the full participation of a disabled child's parents in the formulation of their child's individualized education plan ("IEP"). Among other things the IDEA provides both parents and school systems access to administrative procedures to resolve IEP disputes. 20 U.S.C. § 1415(*f*). Either party aggrieved by the state administrative decision may bring a civil action in a federal district court. Jurisdiction is conferred upon the federal district court by 20 U.S.C. § 1415 (*i*)(2)(A).

The exceptional importance of this case presents a compelling basis for certiorari. The opinion of the Fourth Circuit effectively negates Congress's express intent to allow the district court to make findings of fact based on additional evidence not available during the administrative proceedings and to render an independent decision based on a preponderance of the evidence. By requiring that **"considerable deference"** be given to the administrative decision the Fourth Circuit has, in essence, required that the district court affirm the administrative decision if such decision is supported by substantial evidence. A-10. This interpretation of the statute was soundly rejected by this Court's opinion in *Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, at 205, 102 S. Ct. 3034, 3050, 73 L.Ed. 690 (1982). It is of great import that certiorari be granted in this case to insure that the intent of Congress be followed.

The underlying administrative proceeding arose at the request of the Loudoun County School Board (hereinafter "Loudoun") who sought to remove Mark Hartmann from the regular education classroom and place him in a classroom solely for children with autism. A local due process hearing and a state level review were conducted by the Virginia Department of Education. Both the hearing officer and reviewing officer approved Loudoun's proposed removal of Mark from the regular education classroom. A-46,47. This decision was appealed by the Hartmanns to the federal district court.[3] The Hartmanns requested that Loudoun be enjoined from educating Mark in the proposed segregated classroom solely for autistic children and further that Loudoun be ordered to educate Mark in the regular education classroom.[4]

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[3] Edgar B. Hatrick and Ned Waterhouse were originally named as defendants in their official capacity as employees of the Loudoun School Board. They were dismissed as defendant's upon their motion by the trial court. Plaintiffs did not appeal their dismissal.

[4] Subsequent to the due process hearing decision and while pursuing their due process appeal rights the Hartmann's voluntarily removed Mark

A two-day bench trial was held. The court admitted approximately twenty-five additional exhibits and heard the testimony of five witnesses called by the Hartmanns and three witnesses called by Loudoun. The district court found in favor of the Hartmanns requiring Loudoun to place Mark Hartmann in a regular education classroom with an appropriately modified curriculum and a one-on-one educational aide. A-21.

Loudoun appealed this decision. The Fourth Circuit reversed the district court, finding that it's ruling was contrary to the law and the evidence in the record. A-8.

REASONS FOR GRANTING THE PETITION

It is of vital importance that parents of student with disabilities, aggrieved by the findings of a state educational agency, be permitted full and unfettered access to the federal courts as contemplated by Congress and unambiguously expressed in the statute conferring jurisdiction upon federal district courts. In particular, the district courts must be permitted to receive and give appropriate weight to additional evidence which by statute it is required to receive. This is of even greater importance where, as in the instant case, the court must grant prospective relief by determining where a child should be educated upon the conclusion of the trial. If the Fourth Circuit's decision is permitted to stand it will improperly thwart the intent of Congress which has unambiguously required that federal district courts render opinions based on a preponderance of all of the evidence before it, including additional evidence not previously available during the administrative proceedings.

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from the Loudoun school system and enrolled him in a public school in Montgomery County, Virginia. Mark has been educated in a regular education classroom since his enrollment in March of 1995.

ARGUMENT

I. THE FOURTH CIRCUIT'S RATIONALE FOR REJECTING THE DISTRICT COURT'S FINDINGS OF FACT WAS INCORRECT AS A MATTER OF LAW.

The Fourth Circuit incorrectly ruled that the district court had failed to give "considerable deference" to the findings of the administrative proceedings. A-10. The application of a "considerable deference" standard is improper as a matter of the law. By statute the district court is required to review the administrative record and to receive additional evidence. The district court is then instructed to render a decision based on a preponderance of the evidence. 20 U.S.C. 1415(*i*)(2)(B)(iii). With this ruling the Fourth Circuit has impermissibly limited the role of the district court as a trier of fact.

A. The district court emphasized the importance of the additional evidence received during the two-day bench trial.

The district court was asked to decide whether Mark Hartmann should receive special education services in a regular education classroom or a self-contained classroom exclusively for children with autism. In making its findings the district court stated

> ... The evidence presented during the two-day trial was extremely relevant to evaluating the adequacy of the Hearing officer's decision, and has played a significant role in the Court's decision.

A-22. Among other things, the district court found that

> ... Mark is able to receive significant educational benefits when included in a regular education setting as long as he has the help of a one-on-one aide and properly adapted curriculum. The Court also finds that when Mark is managed properly he is no more disruptive than his non-disabled peers. Lastly, the Court finds that the Hearing Officer

> failed to consider extensive evidence showing that Mark can learn when included in the regular education setting. Therefore, the decision of the Hearing Officer is reversed and judgement entered in favor of the plaintiffs.

A-21.

The district court based its decision on the record of the "five-day due process hearing, the opinion of the Hearing Officer, the testimony presented before [the] Court in a two-day bench trial and the video tape showing two of Mark's school days in Montgomery County, Virginia, school system."[5] A-20. In particular, the court cited the testimony of Kenna Colley, inclusion specialist for Mongomery County; Beverly Strager, Mark's fourth grade regular education teacher and Greg Paynter, Mark's fourth grade instructional aide. Each of these witnesses provided evidence of Mark's progress in the regular education setting. A-33,34. Although the district court issued a detailed and comprehensive explanation of the evidence before it and the rationale for its decision, its findings were rejected by the court of appeals as a matter of law.[6]

B. The Fourth Circuit applied an incorrect standard when it required that the district court give "considerable deference" to the administrative decision.

In it's decision the appellate court stated "[W]hile the district court opinion references the hearing officer's decision, its failure to address the administrative findings noted above simply does not reflect the teachings of *Rowley* and *Doyle* that state proceedings must command ***considerable deference*** in

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[5] The bench trial was held in September of 1996, the testimony of the Hartmann witnesses referred to Mark's previous school year and the video tapes were made in the spring of that year.

[6] The Fourth Circuit stated "we are forced to conclude that the district court's decision fails to account for the administrative findings and is not supported by the evidence based on a correct application of the law." A-8.

federal courts." (Emphasis added, A-10.) Petitioners are aware of no other circuit which has applied a "considerable deference" test in reviewing the findings of a trial court. Such a test is certainly not contemplated by the IDEA. By requiring that "considerable deference" be given the administrative decision the appellate court has drastically limited the ability of the district court to give due weight to the additional evidence before it.

Indeed, this Court has clearly rejected such an interpretation of the IDEA. In *Rowley* the school board argued that the administrative findings should be upheld by the district court if supported by substantial evidence. This Court stated

> Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that Courts were to make "independent decision[s] based on a preponderance of the evidence. S Conf. Rep No. 94-455, ...See also 121 Cong. Rec. 37416 (1975) (remarks of Sen Williams).

Rowley at 205.

The leading post-*Rowley* case interpreting the district court's role under the IDEA is *Town of Burlington v. Dept. of Education*, 736 F.2d 773, 791-792 (1st Cir. 1984), *aff'd* on other grounds 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2D 686, (1988). The First Circuit characterized the court's role as "bounded independent" decision making;

> bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of evidence before the court. ... Congress intended courts to make bounded independent decisions ... "[the] question of the

> weight due the administrative findings of fact must be left to the discretion of the trial court."[7]

Several circuits have characterized this process as a "modified *de novo* review." *Murray v. Montrose County School District RE-1J*, 51 F.3d 921, 927 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 278 (1995); *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d. 455, 458 (6th Cir. 1993) *cert. denied, 114 S. Ct. 2104 (1994).* The Fifth circuit concluded that the "district's court's review of the hearing officer's decision is virtually *de novo*." *See Teague Independent School District v. Todd L.*, 999 F. 2d 127, 131 (5th Cir. 1993).

Prior to the instant case the Fourth Circuit had not articulated a "considerable deference" test, instead it closely followed the dictates of *Rowley* as interpreted by *Burlington.* See *Speilberg v. Henrico County Pub. Sch.*, 853 F.2d 256, 258 (4th Cir.1988), *cert. denied,* 489 U.S. 1016, 109 S.Ct. 1131, 103 L.Ed. 192 (1989), *Prince William v. Malone*, 762 F.2d 1210, 1217-18 (4th Circuit, 1985), *Burke County Bd. of Ed. v. Denton*, 895 F.2d 973, 981 (4th Cir.1990) *Doyle v. Arlington County School Bd.*, 953 F.2d 100, 103 (4th Cir. 1991).[8] In rendering it's decision in the instant case, the Fourth Circuit has clearly adopted a considerably stricter legal standard. A standard which prevents the trial court from rendering an independent decision based on additional evidence by requiring that "considerable deference" be given to the administrative findings as a matter of law. The court

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[7] This approach was expressly adopted by the district court. A-22.

[8] Contrary to its decision in the instant case the Fourth Circuit has previously stated "we think that findings of fact by the hearing officers in cases such as these are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-findings, ***but not requiring it***. [citations omitted]...We are further of the opinion that when fact-findings are regularly made and are entitled to prima facie correctness, the district court, if it is not going to follow them, is required to explain why it does not... After giving the administrative fact findings such due weight, ***if any***, the district court is free to decide the case on the preponderance of the evidence, as required by the statute. (Emphasis added.) *Doyle* at p.105.

stated "we are forced to conclude that the district court's decision fails to account for the administrative findings and is not supported by the evidence based on a correct application of the law."[9] A-8. In essence, the Fourth Circuit now requires that administrative findings be adjudged conclusive "if supported by substantial evidence". This is precisely the standard rejected by Congress and subsequently by this Court in *Rowley*.

C. The "due weight" which should be given to the administrative proceedings must be reduced where, as in the instant case, the district court must provide prospective relief.

The IDEA contemplates that many different types of cases will be heard by federal district courts. In contemplation of the need to fashion remedies which are appropriate to the uniqueness of each child's situation Congress specifically provided that the federal district court shall "grant such relief as the court determines is appropriate". 20 U.S.C. 1415(*i*)(2)(B)(iii). While many special education cases require only a retrospective review, such as when a parent seeks reimbursement for the unilateral placement of the child in a private school, the instant case required prospective relief.[10] The issue before the district court was whether, at the conclusion of the trial, to order Loudoun to educate Mark in a regular education classroom. A-20. As required by the statute additional evidence was received in the form of the testimony of witnesses for both sides, written records of Marks educational program for the past two years and recent video

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[9] The opinion of district court sets out in considerable detail the basis upon which it reached a different conclusion from that of the hearing officer. See generally A-24-38.

[10] The prospective nature of the relief requested in the instant case distinguishes it from such cases as *Burlington* and *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993) which essentially pose the retrospective question of whether a parent is entitled to reimbursement for a unilateral private school placement because the school system failed to propose a free appropriate public education.

tapes of Mark in his Montgomery County elementary school setting. In order to reach its decision the district court had to carefully consider changes in the child's circumstances since the conclusion of the administrative proceedings. As the district court made abundantly clear the decision to require Loudoun to educate Mark in the regular education classroom was based on the evidence that Mark was being educated successfully in the regular education program in the Montgomery County Public School System. A-21.

Because the evidence of Mark's ability to succeed in the regular education environment was not available during the administrative proceedings the district court, in its role as an independent fact-finder, was compelled to reduce the weight to be given the administrative proceedings and give greater weight to the opinions of the educators from Montgomery County who had been educating Mark for the past year and one-half. By requiring that "due weight" be given the administrative proceedings this court clearly recognized the independent role of the district court in weighing the totality of the evidence. *Rowley* at 206.

D. The prospective nature of the district court's inquiry is underscored by the "stay-put" provisions of the IDEA.

The prospective nature of the trial court's inquiry is underscored by the "stay-put" provision of the IDEA. Congress has by statute enjoined local educational agencies, such as Loudoun, from unilaterally carrying out a proposed change of placement. Unless agreed to by the parent, the local educational agency must maintain the child in his "current educational placement" until such time as the full panoply of due process rights are exhausted. 20 U.S.C. 1415(j). This includes the proceedings before the federal district court.[11]

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[11] Since first grade, Mark's educational placement has always been in the regular education classroom whether in Illinois, Loudoun County or Montgomery County. Mark is now in sixth grade.

This Court stated "[W]e think at least one purpose of 1415(e)(3) [now 1415(j)] was to prevent school officials from removing a child from the regular public classroom over the parents' objection pending completion of the review proceedings." *Honig v. Doe*, 484 U.S. 305, 323; 108 S.Ct. 592, 604; 98 L.Ed.2d 686, (1988). The Second Circuit characterized this statute as an automatic preliminary injuction. *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982.) Injunctive relief, by its very nature, requires the court to assess present circumstances of the parties. In contemplating whether to permit a change in placement, significant changes in the child's circumstances occurring after the close of the administrative proceedings may render those proceedings of little weight. This is precisely what occurred in the instant case. Thus, the district court was required to make a decision based on Mark's educational needs and abilities as they existed at the time of trial not as they were during the administrative proceedings.[12]

E. The concept of "mootness" requires that the district court give appropriate weight to the additional evidence received.

The Fourth Circuit rejected Loudoun's claim that the case did not present a live controversy and was therefore moot. The court stated

> Loudoun County contends that the Hartmanns do not present a valid case or controversy because Mark is currently in an educational placement which the Hartmanns find appropriate. Under the unusual circumstances of this case, this conclusion is not correct. There is no question that the Hartmanns would reenroll Mark in Loudoun County

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[12] Loudoun's decision to change Mark's placement was made in May of 1994. The Hearing decision was rendered in December, 1994 and the State level decision in May 1994. The Hartmann's filed their civil action in December 1995. The bench trial was conducted in September, 1996 and the court issued its decision on November 27, 1996.

> if their suit is successful. Specifically, the Hartmanns' expressed intent to return Mark to school there is corroborated by the fact that Mark's father and sister continue to occupy the family's home in Loudoun County.

A-6, fn.1. Yet, their requirement that the district court give "considerable deference" to the administrative proceedings ignores the logic for rejecting the mootness argument.

As the Fourth Circuit recognized the case was not moot precisely because it continued to present a live controversy. In order to resolve this live controversy the district court was required to make a decision as to Mark's educational placement at the time of trial. Even if the district court were to have found that the two-year old hearing decision was correct when made, the court would have been compelled to reach a decision based on the circumstances with which it was confronted. The controversy before the district court was grounded in Mark's educational needs and abilities at the time of trial and not what they were two years prior to the trial. In effect, the growth Mark made, educationally, socially and behaviorally, between second grade and fifth grade rendered the initial decision essentially irrelevant.

This is best exemplified by the issue of Mark's classroom behavior. While it is clear from the hearing decision that Mark presented significant behavior problems during second grade it was equally clear to the trial judge that by the fifth grade "when Mark is properly managed he is no more disruptive than his non-disabled classmates." A-21. If the trial court is required to give "considerable deference" to the administrative findings on this point, Mark Hartmann, now a sixth grader, will be denied his right to participate in the regular classroom for disruptive behavior committed as a second grader. Such an injustice is precisely what Congress sought to avoid by requiring that the trial court receive

additional evidence at the request of a party prior to rendering its independent decision.[13]

II. THE COURT FAILED TO APPLY THE APPROPRIATE LEVEL OF REVIEW WITH RESPECT TO THE DISTRICT COURT'S FINDINGS OF FACT.

As fully discussed above the district court is required by statute to make findings of fact based on the administrative record and the additional evidence presented by the parties at trial. It is well established law that a court of appeals shall not overturn factual determinations unless the district court findings are "clearly erroneous". Findings of fact are deemed "clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), *In Re: Green*, 934 F.2d 568, 570 (4th Cir. 1991).

When the Fourth Circuit initially reviewed the statutory role of the district court it clearly recognized the independent fact finding role of the trial court. In *Prince William v. Malone*, 762 F.2d 1210, 1217-18 (4th Circuit, 1985) it found that the "due weight" requirement of *Rowley* did not obviate the district court's role as "trier of fact" and that the additional testimony heard by the district court (two education experts) was sufficient, in itself, to persuade the district court that the school board had not complied with IDEA. The Fourth Circuit further stated

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[13] See *Murray v. Montrose County School District RE-1J*, 51 F.3d 921, 931 (10th Cir. 195) ("evidence relating to a child's educational progress subsequent to the due process hearing would be relevant to a determination of appropriate placement pursuant to an IEP") *Stockton v. Barbour County Board of Education*, 884 F. Supp 201, 207 (N.D.W.Va. 1995) (court heard evidence of child's post-IEP success at parent's desired placement).

> While the Supreme Court in *Rowley* made it clear that due weight should be given the results of the state administrative proceedings, the Court recognized that Congress intended the courts to make "independent decisions[s] based on a preponderance of the evidence ...." The district court has made an independent factual finding determination which this Court should not overturn unless we find it to be clearly erroneous.

In *Doyle v. Arlington County School Bd.*, 953 F.2d 100, at 104 (4th Cir. 1991) the Fourth Circuit in discussing the weight to be given a fact-finder by a reviewing body states

> ... F.R.C.P. 52(a) provides that "...due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses." And we have held that "[We] may not reverse a trier of fact, who had the advantage of hearing testimony, on the question of credibility." *McCrary v. Runyon*, 515 F.2d 1082, 1086 (4th Cir. 1975) *aff'd* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed. 415 (1976).

The district court conducted a two day bench trial during which it heard the testimony of an expert witness, Joseph Hartmann and Montgomery County school system personnel, consisting of Mark's special education teacher, regular education teacher, and instructional aide. In addition the court heard the testimony of Loudoun personnel, consisting of Carolyn Clement, Mark's speech and language teacher from second grade, Frank Johnson, a special education supervisor who consulted on Mark's program and the special education teacher for the self-contained "autistic-classroom".

Clearly, the Fourth Circuit was disturbed by the fact that the district court gave greater weight to the testimony of the local public school authorities from Montgomery County who taught Mark in the "included" setting of the regular education classroom for the year prior to the bench trial. The court stated

> While making much of the credentials and credibility of witnesses endorsing full inclusion, the court gave little or no attention to the testimony of Loudoun professionals. In some instances the court, without listening to local educators, discounted their views despite the fact that the hearing officer had found them credible. ***One Loudoun official was dismissed outright as "a philosophical opponent of inclusion" for daring to state that he saw no evidence that Mark had progressed in the regular classroom.***

(Emphasis added, A-17.) The "philosophical opponent of inclusion" referred to by the court of appeals was Frank Johnson, Loudoun's supervisor of special education. Loudoun presented Mr. Johnson as one of three witnesses who testified before the district court. A-31. Thus, the district court had the opportunity to listen to his testimony, observe his demeanor and weigh it against the testimony of the educators from Montgomery County. It is precisely because the trial court had the opportunity to hear Mr. Johnson testify that it was entitled to dismiss his opinions as lacking in credibility.[14]

The Fourth Circuit, being of the opinion that considerable deference was due the administrative hearing decision as a matter of law, summarily dismissed the evidence presented by the local educational authorities who were educating Mark in Montgomery County, Virginia. In so doing the Fourth Circuit ignored its duty to defer to district court in its role as the trier of fact. F.R.C.P. 52(a). The Fourth Circuit has clearly violated the well established principal that a district court's finding of fact shall not be reversed unless they are clearly erroneous.

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[14] While the Fourth Circuit states that the district court discounted the views of witnesses that were deemed credible by the hearing officer, it does not identify these witnesses or state the significance of their testimony.

IV. CONCLUSION

The decision of the court of appeals in reversing the decision of the district court and remanding it for dismissal should be reversed. The matter should be remanded with instructions that the court of appeals defer to the findings of fact made by the district court and/or review said findings under the "clearly erroneous" standard.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 96-2809

MARK HARTMANN, a minor, by his parents and next friends, Roxanna Hartmann and Joseph Hartmann; ROXANNA HARTMANN; JOSEPH HARTMANN,

Plaintiffs-Appellees,

v.

LOUDON COUNTY BOARD OF EDUCATION,

Defendant-Appellent,

and

EDGAR B. HATRICK; NED WATERHOUSE,

Defendants.

VIRGINIA SCHOOL BOARDS ASSOCIATION; TIDEWATER DOWN SYNDROME ASSOCIATION; THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, VIRGINIA CHAPTER; THE ARC OF VIRGINIA; SPINA BIFIDA ASSOCIATION OF TIDEWATER; TIDEWATER ASSOCIATION FOR HEARING IMPAIRED CHILDREN; ENDEPENDENCE CENTER, INCORPORATED;

THE VIRGINIA FOUNDATION FOR THE EXCEPTIONAL CHILD AND ADOLESCENT; GRAFTON SCHOOL, INCORPORATED; PARENTS AND CHILDREN COPING TOGETHER, INCORPORATED; NORTHERN VIRGINIA CHAPTER OF THE AUTISM SOCIETY OF AMERICA; CENTRAL VIRGINIA CHAPTER OF THE AUTISM SOCIETY OF AMERICA; PENINSULA CHAPTER OF THE AUTISM SOCIETY OF AMERICA; AUTISM TRAINING AND FAMILY SUPPORT PROGRAM; ATTENTION DEFICIT DISORDER ASSOCIATION OF VIRGINIA; PENINSULA ATTENTION DEFICIT DISORDER ASSOCIATION; THE VIRGINIA INSTITUTE OF AUTISM, INCORPORATED; COMMONWEALTH COALITION FOR

COMMUNITY; LOUDOUN ASSOCIATION FOR RETARDED CITIZENS; UNITED STATES OF AMERICA,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(CA- 95- 1686- A)

Argued: May 9, 1997

Decided: July 8, 1997

Before WILKINSON, Chief Judge, LUTTIG, Circuit Judge,
and COPENHAVER, United States District Judge
for the Southern District of West Virginia,
sitting by designation.

Reversed and remanded with instructions to dismiss by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Luttig and Judge Copenhaver joined.

COUNSEL

ARGUED: Kathleen Shepherd Mehfoud, HAZEL & THOMAS, P.C., Richmond, Virginia, for Appellant. Gerard Sale Rugel, Herndon, Virginia, for Appellees. **ON BRIEF**: James J. Wheaton, Charles B. Lustig, WILLCOX & SAVAGE, P.C., Norfolk, Virginia, for Amici Curiae Tidewater Down Syndrome Association, et al. John F.Cafferky, Kathryn Y. Aspegren, HUNTON & WILLIAMS, McLean, Virginia, for Amicus Curiae Virginia School Boards Association. Isabelle Katz Pinzler, Acting Assistant Attorney General, Mark L. Gross, Michelle M. Aronowitz, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Judith A. Winston, General Counsel, Francisco Lopez, DEPARTMENT

OF EDUCATION, Washington, D.C., for Amicus Curiae United States.

OPINION

WILKINSON, Chief Judge:

Roxanna and Joseph Hartmann brought suit on behalf of their disabled son Mark against the Loudoun County Board of Education under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. The Hartmanns alleged that the Board had failed to ensure that Mark was educated with non-handicapped children "to the maximum extent appropriate" as required by the IDEA's mainstreaming provision, 20 U.S.C. § 1412(5)(B). The district court agreed, rejecting the findings of both the local hearing officer and the state review officer. The Board appeals, contending that the court's decision is contrary to the law and the evidence in the record. We agree. As Supreme Court precedent makes clear, the IDEA does not grant federal courts a license to substitute their own notions of sound educational policy for those of local school authorities, or to disregard the findings developed in state administrative proceedings. Upon careful review of the record, however, we are forced to conclude that this is precisely what has occurred in this case. Accordingly, we reverse and remand with directions to dismiss.

I.

Mark Hartmann is an eleven-year-old autistic child. Autism is a developmental disorder characterized by significant deficiencies in communication skills, social interaction, and motor control. Mark is unable to speak and suffers severe problems with fine motor coordination. Mark's writing ability is extremely limited; he does not write by hand and can consistently type only a few words such as "is" and "at" by himself on a keyboard device known as a Canon communicator. The parties agree that Mark's greatest need is to develop communication skills.

Mark spent his pre-school years in various programs for disabled children. In kindergarten, he spent half his time in a self-contained program for autistic children and half in a regular education classroom at Butterfield Elementary in Lombard, Illinois. Upon entering first grade, Mark received speech and occupational therapy one-on-one, but was otherwise included in the regular classroom at Butterfield full-time with an aide to assist him.

After Mark's first-grade year, the Hartmanns moved to Loudoun County, Virginia, where they enrolled Mark at Ashburn Elementary for the 1993-1994 school year. Based on Mark's individualized education program (IEP) from Illinois, the school placed Mark in a regular education classroom. To facilitate Mark's inclusion, Loudoun officials carefully selected his teacher, hired a full-time aide to assist him, and put him in a smaller class with more independent children. Mark's teacher, Diane Johnson, read extensively about autism, and both Johnson and Mark's aide, Suz Leitner, received training in facilitated communication, a special communication technique used with autistic children. Mark received five hours per week of speech and language therapy with a qualified specialist, Carolyn Clement. Halfway through the year, Virginia McCullough, a special education teacher, was assigned to provide Mark with three hours of instruction a week and to advise Mark's teacher and aide.

Mary Kearney, the Loudoun County Director of Special Education, personally worked with Mark's IEP team, which consisted of Johnson, Leitner, Clement, and Laurie McDonald, the principal of Ashburn. Kearney provided in-service training for the Ashburn staff on autism and inclusion of disabled children in the regular classroom. Johnson, Leitner, Clement, and McDonald also attended a seminar on inclusion held by the Virginia Council for Administrators of Special Education. Mark's IEP team also received assistance from educational consultants Jamie Ruppmann and Gail Mayfield, and Johnson conferred with additional specialists whose names were provided to her by the Hartmanns and the

school. Mark's curriculum was continually modified to ensure that it was properly adapted to his needs and abilities.

Frank Johnson, supervisor of the county's program for autistic children, formally joined the IEP team in January, but provided assistance throughout the year in managing Mark's behavior. Mark engaged in daily episodes of loud screeching and other disruptive conduct such as hitting, pinching, kicking, biting, and removing his clothing. These outbursts not only required Diane Johnson and Leitner to calm Mark and redirect him, but also consumed the additional time necessary to get the rest of the children back on task after the distraction.

Despite these efforts, by the end of the year Mark's IEP team concluded that he was making no academic progress in the regular classroom. In Mark's May 1994 IEP, the team therefore proposed to place Mark in a class specifically structured for autistic children at Leesburg Elementary. Leesburg is a regular elementary school which houses the autism class in order to facilitate interaction between the autistic children and students who are not handicapped. The Leesburg class would have included five autistic students working with a special education teacher and at least one full-time aide. Under the May IEP, Mark would have received only academic instruction and speech in the self-contained classroom, while joining a regular class for art, music, physical education, library, and recess. The Leesburg program also would have permitted Mark to increase the portion of his instruction received in a regular education setting as he demonstrated an improved ability to handle it.

The Hartmanns refused to approve the IEP, claiming that it failed to comply with the mainstreaming provision of the IDEA, which states that "to the maximum extent appropriate," disabled children should be educated with children who are not handicapped. 20 U.S.C. § 1412(5)(B). The county initiated due process proceedings, *see* 20 U.S.C. § 1415(b), and on December 14, 1994, the local hearing officer upheld the May 1994 IEP. She found that Mark's behavior was

disruptive and that despite the "enthusiastic" efforts of the county, he had obtained no academic benefit from the regular education classroom. On May 3, 1995, the state review officer affirmed the decision, adopting both the hearing officer's findings and her legal analysis. The Hartmanns then challenged the hearing officer's decision in federal court.

While the administrative process continued, Mark entered third grade in the regular education classroom at Ashburn. In December of that year, the Hartmanns withdrew Mark from Ashburn. Mark and his mother moved to Montgomery County, Virginia, to permit the Hartmanns to enroll Mark in public school there. Mark was placed in the regular third-grade classroom for the remainder of that year as well as the next.[1]

The district court reversed the hearing officer's decision. The court rejected the administrative findings and concluded that Mark could receive significant educational benefit in a regular classroom and that "the Board simply did not take enough appropriate steps to try to include Mark in a regular class." The court made little of the testimony of Mark's Loudoun County instructors, and instead relied heavily on its reading of Mark's experience in Illinois and Montgomery County. While the hearing officer had addressed Mark's conduct in detail, the court stated that "[g]iven the strong presumption for inclusion under the IDEA, disruptive behavior should not be a significant factor in determining the appropriate educational placement for a disabled child." Loudoun County now appeals.

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[1] Loudoun County contends that the Hartmanns do not present a valid case or controversy because Mark is currently in an educational placement which the Hartmanns find appropriate. Under the unusual circumstances of this case, this conclusion is not correct. There is no question that the Hartmanns would reenroll Mark in Loudoun County if their suit is successful. Specifically, the Hartmanns' expressed intent to return Mark to school there is corroborated by the fact that Mark's father and sister continue to occupy the family's home in Loudoun County.

II.

The IDEA embodies important principles governing the relationship between local school authorities and a reviewing district court. Although section 1415(e)(2) provides district courts with authority to grant "appropriate" relief based on a preponderance of the evidence, 20 U.S.C. § 1415(e)(2), that section "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982). Absent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task. Likewise, federal courts must accord "due weight" to state administrative proceedings. *Id.* Administrative findings in an IDEA case "are entitled to be considered prima facie correct," and 'the district court, if it is not going to follow them, is required to explain why it does not." *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991).

These principles reflect the IDEA's recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment. Rather it establishes a "basic floor of opportunity" for every handicapped child. *Rowley*, 458 U.S. at 201. States must provide specialized instruction and related services "sufficient to confer some educational benefit upon the handicapped child," *id.* at 200, but the Act does not require "the furnishing of every special service necessary to maximize each handicapped child's potential," *id.* at 199.

In this same vein, the IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate. Under its terms, disabled children are to be educated with children who are not handicapped only "to the maximum extent appropriate." 20 U.S.C. § 1412(5)(B). Section 1412(5)(B) explicitly states that mainstreaming is not

appropriate "when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B); see also *Rowley*, 458 U.S. at 181 n.4.

III.

The district court's ruling strayed generally from the aforementioned principles. It diverged in particular from our decision in *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). In *DeVries*, we held that mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or, (3) the disabled child is a disruptive force in a regular classroom setting. *Id.* at 879. Although the district court failed to mention *DeVries*, its opinion suggests that none of these three categories describes Mark's situation. The district court found that Mark could receive substantial educational benefit in a regular classroom, that his disruptive behavior was not sufficient to justify a more segregated instructional setting, and that the Leesburg program would not have been an appropriate placement. After careful examination of the record, however, we are forced to conclude that the district court's decision fails to account for the administrative findings and is not supported by the evidence based on a correct application of the law. In effect, the court simply substituted its own judgment regarding Mark's proper educational program for that of local school officials.

A.

In finding that Mark could receive an educational benefit in a regular classroom, the district court disregarded both the hearing officer's finding and the overwhelming evidence that Mark made no academic progress in the regular second grade classroom at Ashburn. Mark's teacher testified, for example,

that he was unable to retain skills: "once we thought he mastered [a math skill] and we left it alone and went onto another concept, if we went back to review, it seemed that the had forgotten." She confessed, "I felt like he lost a year in my classroom." Other Loudoun County personnel testified to the same effect. His speech therapist, for instance, stated that "[t]he only gain that I saw him make was in the one to one setting." The supervisor for the county's program for autistic students likewise concluded, "I think there has been no progress academically in the inclusive settings;" "I think we're wasting his time." The hearing officer accordingly found that "Mark made no measurable academic progress attributable to his placement in the regular classroom."

Mark's situation is similar to the one we faced in *DeVries*, 882 F.2d 876. In upholding Fairfax County's decision not to place Michael DeVries in Annandale High School, the court observed not only that Michael would derive virtually no academic benefit from the regular classroom, but also that his work would be at a much lower level than his classmates and that he would in effect "simply be monitoring classes." *Id.* at 879. Here the hearing officer made an identical finding, concluding that Mark "did not participate in the regular curriculum, but was provided his own curriculum." Mark's special education teacher in Loudoun County explained, "Mark needs a completely different program . . . . His skills have to be taught in a different way, in a different sequence, and even a different group of skills . . . from what his typical functioning peers are learning."

The district court acknowledged the testimony of Mark's second grade teacher regarding his lack of progress, but asserted that the hearing officer's conclusions were erroneous because the officer failed to give due weight to the testimony of Cathy Thornton, Mark's private tutor during second grade, and to Mark's first grade experience in Illinois. To the contrary, the administrative decisions took careful note of both. The hearing officer fully credited Thornton's testimony, finding that Mark made progress with both her and his speech

therapist. The officer went further, however, and observed that both the tutoring and speech instruction occurred in a one-to-one setting outside of the regular class. In light of Mark's failure to progress in the regular classroom, the officer drew the only reasonable inference from this evidence, namely that separate instruction was precisely what Mark needed to make educational progress. As to Mark's experience in Illinois, the state review officer explained that the Illinois assessment of Mark's capabilities was flawed:

> [I]t became clear during the course of the second grade that Mark's academic skills were not as advanced as the Illinois school system thought. Mark cannot read and cannot add, yet the Illinois teachers thought he was reading at first grade level and progressing in the first grade math workbook. . . . Mark apparently did not make the academic progress in first grade the records forwarded to Loudoun County from Illinois indicated . . . .

While the district court opinion references the hearing officer's decision, its failure to address the administrative findings noted above simply does not reflect the teachings of *Rowley* and *Doyle* that state proceedings must command considerable deference in federal courts.

The district court also relied heavily on Mark's subsequent performance in the Montgomery County schools during fourth grade. While Montgomery County personnel did make some conclusory statements asserting that Mark made progress, the evidence is inconclusive at best. The district court pointed to math skills Mark demonstrated at the end of fourth grade, for example, but Mark was pulled out of the regular class for math instruction, just as Loudoun County had recommended. Any progress he made in math therefore simply supports the conclusion that separate, one-on-one instruction is appropriate for Mark. Mark also continued to receive speech therapy one-on-one, and his special education teacher in Montgomery County admitted that the county had no reliable method for assessing Mark's reading ability.

Finally, the district court pointed to perceived improvement in Mark's social skills due to interaction with his non-disabled peers. Any such benefits, however, cannot outweigh his failure to progress academically in the regular classroom. The mainstreaming provision represents recognition of the value of having disabled children interact with non-handicapped students. The fact that the provision only creates a presumption, however, reflects a congressional judgment that receipt of such social benefits is ultimately a goal subordinate to the requirement that disabled children receive educational benefit. Here the evidence clearly supports the judgment of the local education officials and the administrative hearing officers that Mark's educational progress required significant instruction outside of the regular classroom setting.

B.

The district court attributed Mark's lack of progress in Loudoun County to the county's alleged failure to make reasonable efforts to accommodate him in the regular classroom. We interpret this as a ruling that the county failed to provide the supplementary aids and services contemplated by the IDEA's mainstreaming provision. 20 U.S.C. § 1412(5)(B).

The district court's conclusion is remarkable in light of the extensive measures taken on Mark's behalf. The hearing officer found that Loudoun personnel were "enthusiastic" about including Mark at Ashburn, a description fully supported by the record. The Ashburn principal deliberately reduced the size of Mark's class and ensured that it was composed of students who were more independent and had higher level skills. Mark's teacher was selected because of her excellent teaching abilities, and the county hired a full-time, one-on-one aide for Mark. Mark received a full hour of speech and language instruction daily. Frank Johnson, the supervisor of the county's program for autistic children, provided assistance in behavior management throughout the year. Halfway through the year, the school's efforts increased

when Virginia McCullough began providing special education services directly to Mark as well as advising Mark's teacher and aide. Inclusion specialists Gail Mayfield and Jamie Ruppmann consulted with the school during the fall, and Mark's teacher sought advice from other experts whose names were provided to her by the school or the Hartmanns. The teacher testified that she met constantly with Mark's aide, his speech therapist, the IEP team, and others to work on Mark's program -- daily at the beginning of the year and at least twice a week throughout.

The district court nonetheless found the county's efforts insufficient. The court relied primarily on its conclusion that the Loudoun educators involved with Mark had inadequate training and experience to work with an autistic child.[2] The court found the credentials of two groups to be lacking. Neither the special education professionals nor the regular education instructors were deemed properly qualified. The conclusion that Mark had inadequately trained personnel developing and implementing his program, however, is irreconcilable with either the law or the record.

As to special education personnel, the district court concedes that the individuals working with Mark during the first half of the year, Mary Kearney and Jamie Ruppmann, were fully competent to assist him. Kearney led Mark's IEP team, while Ruppmann provided consultation services. In addition to serving as the county Director of Special Education, Kearney had participated in the Virginia Systems

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[2] The court also concluded that Loudoun County's commitment to mainstreaming Mark lapsed at mid-year. Such a conclusion again does not take proper account of the administrative record as required by *Rowley* and *Doyle*. The hearing officer pointed out, for example, that the county actually *added* services for Mark in the second half of the year, when McCullough began providing special education instruction to Mark. Moreover, the hearing officer noted that the IEP prepared by Mark's team in March--three months after the county allegedly gave up on mainstreaming him--called for retaining him in the regular classroom.

Change Project, a two-year state program on mainstreaming which involved selected schools from across the state. Ruppmann is an experienced, highly qualified consultant.

During the second half of the year, Frank Johnson led the IEP team, and Virginia McCullough provided Mark with special education services. The district court rejected their qualifications, asserting, for example, that Johnson's credentials were clearly inadequate because they were inferior to those of Kearney and Ruppmann. However, in addition to serving as the supervisor of Loudoun County's program for autistic children, Johnson had a special education masters degree, did graduate work with an autistic child, worked directly with approximately ten autistic children as a teacher, and had attended special education courses and seminars relating to autism throughout his professional career. Both McCullough's early childhood degree program and her work in Loudoun County focused specifically on integrating children with disabilities into the regular classroom.

To dismiss Johnson's and McCullough's qualifications is to adopt exactly the sort of potential-maximizing standard rejected by the Supreme Court in *Rowley*. We think the Court's admonition that the IDEA does not require "the furnishing of every special service necessary to maximize each handicapped child's potential," *Rowley*, 458 U.S. at 199, encompasses the notion that the IDEA likewise does not require special education service providers to have every conceivable credential relevant to every child's disability. Not all school systems will have the resources to hire top-notch consultants, nor will every school have the good fortune to have personnel who were involved in a major state program related to the needs of every disabled child. We note that in Virginia, there is no certification for autism. Furthermore, at the time of the trial, Loudoun County had eleven autistic children in a total school population of approximately 20,000 students. In this light, Johnson's experience teaching ten autistic children was substantial. Johnson and McCullough were clearly qualified to work with Mark as special educators,

even accepting the district court's assertion that Ruppmann and Kearney had better credentials.

The suggestion that the regular education instructors, Mark's teacher and aide, were not adequately qualified also does not survive close scrutiny. Diane Johnson was an experienced professional properly certified under state law, and Virginia law does not require teaching assistants to be certified. Furthermore, Johnson and Leitner both obtained special training to work with Mark. Both received in-service instruction and attended an outside seminar on inclusion of disabled children in the regular classroom. They also were trained in facilitated communication, a special communication method used with Mark in Illinois.

To demand more than this from regular education personnel would essentially require them to become special education teachers trained in the full panoply of disabilities that their students might have. Virginia law does not require this, nor does the IDEA. First, such a requirement would fall a foul of *Rowley*'s admonition that the IDEA does not guarantee the ideal educational opportunity for every disabled child. Furthermore, when the IDEA was passed, "Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." *Rowley*, 458 U.S. at 208. The IDEA "expressly incorporates State educational standards." *Schimmel v. Spillane*, 819 F.2d 477, 484 (4th Cir. 1987). We can think of few steps that would do more to usurp state educational standards and policy than to have federal courts re-write state teaching certification requirements in the guise of applying the IDEA.

In sum, we conclude that Loudoun County's efforts on behalf of Mark were sufficient to satisfy the IDEA's mainstreaming directive.

C.

The district court also gave little or no weight to the disruptive effects of Mark's behavior in the classroom, stating that "[g]iven the strong presumption for inclusion under the IDEA, disruptive behavior should not be a significant factor in determining the appropriate educational placement for a disabled child." This statement simply ignores *DeVries*, where we specifically held that mainstreaming is inappropriate when "the handicapped child is a disruptive force in the non-segregated setting." 882 F.2d at 879 (quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983)). In this case, disruptive behavior was clearly an issue. The hearing officer summarized:

> [Mark's] misbehaviors include continual vocalization, especially whining, screeching and crying when unhappy or frustrated, hitting, pinching, kicking, biting, sucking the leg of a chair, rolling on the floor, and removing his shoes and clothing. Mark is a big strong child who cannot be easily restrained when he engages in injurious behaviors such as hitting, kicking, pinching and biting. His continual vocalizations are distracting and make it difficult for other children to stay on task. When Jamie Ruppmann observed Mark in his classroom, she observed two instances of significant disruption, in which he threw himself on the floor. She noted that in each instance it took about five to eight minutes to get Mark settled down. His loud screeching outbursts, which occur daily, take the attention of the teacher and the aide to redirect him; these outbursts also take the other children off task and they then have to be redirected. Mark hits and pinches others several times a day.

While the hearing officer did not find Mark's disruptive behavior by itself to be dispositive, the attention she gave to

Mark's conduct was entirely appropriate, indeed required, under *DeVries*.

D.

The district court also found that Leesburg would not have been an appropriate placement. This conclusion generally derived from the same analysis that led to the court's determination that Mark should remain in the regular classroom. To the contrary, we hold that the proposed Leesburg placement was carefully tailored to ensure that he was mainstreamed "to the maximum extent appropriate." 20 U.S.C. § 1412(5)(B). Leesburg was a regular elementary school. Responding to Mark's lack of academic progress in the regular classroom, the May IEP would have placed Mark in the self-contained class for his academic subjects, while including him with his non-disabled peers for all other school activities such as art, music, and physical education. To promote the success of this partial mainstreaming, the hearing officer required the school to have an aide or teacher accompany Mark whenever he was in the regular classroom environment and to place Mark with the *same* regular education class for all his non-academic activities.

IV.

This is not a case which either the local educational authorities or the reviewing administrative officers took lightly. We have sketched in great detail the efforts that Loudoun County made to provide Mark Hartmann with a suitable education. Furthermore, the administrative review process could not have been more thorough. The hearing officer heard testimony from eighteen witnesses over a two month period and made detailed factual findings regarding all aspects of Mark's educational experience. The officer's analysis carefully incorporated those findings and specifically addressed the evidence the Hartmanns presented in support of their position. The district court, however, set all this extensive effort and review at nought. The court failed to mention, let alone discuss, critical administrative findings

inconsistent with its conclusions. While making much of the credentials and credibility of witnesses endorsing full inclusion, the court gave little or no attention to the testimony of Loudoun professionals. In some instances the court, without listening to local educators, discounted their views despite the fact that the hearing officer had found them credible. One Loudoun official was dismissed outright as "a philosophical opponent of inclusion' for daring to state that he saw no evidence that Mark had progressed in the regular classroom.

The IDEA encourages mainstreaming, but only to the extent that it does not prevent a child from receiving educational benefit. The evidence in this case demonstrates that Mark Hartmann was not making academic progress in a regular education classroom despite the provision of adequate supplementary aids and services. Loudoun County properly proposed to place Mark in a partially mainstreamed program which would have addressed the academic deficiencies of his full inclusion program while permitting him to interact with non-handicapped students to the greatest extent possible. This professional judgment by local educators was deserving of respect. The approval of this educational approach by the local and state administrative officers likewise deserved a deference from the district court which it failed to receive. In rejecting reasonable pedagogical choices and disregarding well-supported administrative findings, the district court assumed an educational mantle which the IDEA did not confer. Accordingly, the judgment must be reversed, and the case remanded with directions to dismiss it.

REVERSED AND REMANDED

IN THE UNITED STATES DISDTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Filed: NOV 27 1996

MARK HARTMANN, a minor
by his parents and next
friends, ROXANNA HARTMANN
and JOSEPH HARTMANN,

Plaintiffs,

v.

LOUDON COUNTY BOARD OF EDUCATION,

Defendant.

Civil Action No. 95-1686-A

ORDER

For the reasons stated in the accompanying Memorandum Opinion, the December 21, 1994, decision of the Hearing Officer is REVERSED and judgment is hereby entered in favor of plaintiffs, and it is hereby

ORDERED, ADJUDGED and DECREED that the Loundoun County Board of Education be and is enjoined at the present time from placing Mark Hartmann in a self-contained classroom for autistic children.

Because the Court wants to minimize problems for the parties in the future, this injunction is temporary. The Court concludes that the parties should try to resolve the language of a more permanent injunction. Therefore, it is hereby

ORDERED that the parties meet and confer within the next fifteen (1) working days with the goal of developing mutually agreeable language for the injunction. The Board's participation in this process as well as in the attorney fee issue

will in no way be considered a waiver of any position it has taken in this litigation or of any appeal rights, and it is further

ORDERED that reasonable attorneys' fees and litigation costs be and are awarded to the plaintiffs for both the administrative proceedings and this litigation. The parties are directed to try to resolve the amount of attorneys' fees and costs. If a resolution of the injunction language and/or the amount of fees or costs is not agreed upon within fifteen (15) working days of this Order, the Court will resolve the issues on the written submissions of counsel. Plaintiffs must file their proposed injunction and/or attorneys' fee petition by January 6, 1997, and defendant must respond by January 13, 1997.

The Clerk is directed to forward copies of the Order to counsel of record.

Entered this 27th day of November, 1996.

/s/ Leonie M. Brinkema

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

IN THE UNITED STATES DISDTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Filed: NOV 27 1996

MARK HARTMANN, a minor
by his parents and next
friends, ROXANNA HARTMANN
and JOSEPH HARTMANN,

Plaintiffs,

v.

LOUDON COUNTY BOARD OF EDUCATION,

Defendant.

Civil Action No. 95-1686-A

MEMORANDUM OPINION

To paraphrase an education commercial, "A mind is a terrible thing to waste." The challenge presented in this lawsuit ultimately focuses on just this concern. The issue is whether Mark Hartmann, an autistic eleven year old boy, should be educated in a regular education classroom which will expose him to a full range of academic subjects and allow him to interact with non-disabled children or be educated in a separate setting which will stress life skills over academic subjects and keep Mark with other disabled children for a significant portion of the day. This dispute pits Mark's parents, educators from Montgomery County, Virginia, and inclusion advocates against the Loudoun County Board of Education and some teachers who have worked with Mark.

Having carefully reviewed transcripts of the five-day due process hearing, the opinion of the Hearing Officer, the testimony presented before this Court in a two-day bench trial and the video tape showing two of Mark's school days in the

Montgomery County, Virginia, school system, the Court is convinced that Mark is able to receive significant educational benefits when included in a regular education setting as long as he has the help of a one-on-one aide and properly adapted curriculum. The Court also finds that when Mark is managed properly he is no more disruptive than his non-disabled classmates. Lastly, the Court finds that the Hearing Officer failed to consider extensive evidence showing that Mark can learn when included in the regular setting. Therefore, the decision of the Hearing Officer is reversed and judgment is entered in favor of the plaintiffs.

I. PROCEDURAL BACKGROUND

The parents of Mark Hartmann ("Mark") have brought this lawsuit under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415, and the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, 42 U.S.C. § 1983. Specifically, they ask the Court to reverse the findings of a due process Hearing Officer who concluded that the Loudoun County Board of Education ("the Board") had established that Mark could not be educated satisfactorily when he received all, or almost all, of his instruction in a regular education classroom, even with the use of supplementary aids and services. She also concluded that the Board's plan to place Mark in a self-contained autism class, located in a regular education school thereby providing opportunities for interaction with nondisabled peers, was appropriate and constituted the least restrictive educational environment for Mark.

At the outset, the Board opposed this lawsuit by arguing that it should be deemed moot because at the present time Mark is not being educated in Loudoun County. Rather than acquiescing to Loudoun County's decision, Mrs. Hartmann established residence in Montgomery County, Virginia, where Mark is presently enrolled in public school. Mr. Hartmann, however, continues to reside in Loudoun County; therefore, Mark remains eligible to attend school in Loudoun County. The parents have also stated they would re-enroll Mark if he

is included in a regular classroom setting. Under these facts, the Court found that the core issues of this action are not moot because the problem is capable of repetition. *See Moore V. Ogilvie*, 394 U.S. 814 (1969).

The Board also opposed the Court conducting a trial, arguing that the Court should base its decision solely on an evaluation of the adequacy of the due process hearing administrative record. However, the Court is required to make a "bounded, independent" decision in this case, "bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court." *Town of Burlington v. Department of Education*, 736 F.2d 773, 791 (1st Cir. 1984), *aff'd on other grounds*, 471 U.S. 359 (1985). The evidence presented during the two-day trial was extremely relevant to evaluating the adequacy of the Hearing Officer's decision, and has played a significant role in the Court's decision. Receipt of such evidence is appropriate under the IDEA, 20 U.S.C. Sec. 1415(e) (2).

Lastly, the Board argues that the Hearing Officer's decision was fully supported by the record and should not be overturned. It is this issue which will be addressed in detail in this opinion.

Mark Hartmann is an eleven year old autistic boy. Autism is a pervasive developmental disorder characterized by significant deficiencies in communication skills, social interaction and motor control.[3] An autistic person is not necessarily mentally retarded and may, in fact, be mentally normal or even a mental genius as in the case of "idiot savants." However, because of the extensive deficits in communication, it is often very difficult to determine an autistic person's intelligence. Mark is unable to speak and suffers severe problems with fine motor coordination. These problems prevent him from writing easily. These handicaps

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[3] See generally the trial testimony of Dr. Schwartz.

make any standardized testing extremely difficult. In Mark's case, those working the most closely with him, including Cathy Thornton, do not believe he is mentally retarded. All witnesses appear to agree that Mark's receptive language skills are much better than his expressive skills, and that his greatest need is to learn communication skills including how to initiate appropriate social interaction.

Mark spent his pre-kindergarten years in a variety of programs which provided him with special education services in settings exclusively for disabled children. For his kindergarten year he spent half his time in a self-contained program for autistic children and half in a regular education classroom at the Butterfield Elementary School in Lombard, Illinois. At Butterfield, Mark's first grade placement was in a regular education classroom with a full-time educational aide. Mark also received one-on-one assistance from speech and language therapists and occupational therapists. No services were provided in a self-contained setting.

Following first grade, Mark moved with his family to Loudoun County, Virginia, where he was enrolled at the Ashburn Elementary School for the 1993-94 school year. Ashburn Elementary School continued the individualized educational plan ("IEP") developed in Illinois and placed Mark in a regular education classroom with children his age. However, in June of 1994, the Board advised Mark's parents of its decision to change Mark's placement from inclusion at Ashburn to the self-contained autism class at Leesburg Elementary School. The parents did not agree with that decision and the school initiated a due process hearing.

The hearing included five days of testimony over August 15, September 26, 27, and 28 and October 27, 1994. At the request of the parents, the hearing was open and the testimony and exhibits are a matter of public record. The parents and the Board were each represented by counsel. On December 21, 1994, the Hearing Officer issued her decision which is the subject of this lawsuit.

II. THE HEARING OFFICER'S FINDINGS

In evaluating the educational program and placement proposed by the Board, the Hearing Officer considered two issues: 1) whether the proposal to remove Mark from the regular classroom violates the Board's obligation to educate him, to the maximum extent appropriate, with nondisabled children; and 2) whether the proposed placement in a self-contained class is appropriate for Mark. Under the IDEA, 20 U.S.C.§1412, a child with a disability is entitled to a free appropriate education. An appropriate education is one that is tailored to the unique needs and disabilities of the individual child and is reasonably calculated to enable the child to receive educational benefits. *Board of Education v. Rowley*, 458 U.S. 176, 187-90 (1982).

The IDEA also contains a requirement that states establish

> . . .procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...."

20 U.S.C. § 412(5) (b); 34 C.F.R. § 300.550(b).

It is clear from the language of the statute that there is a strong presumption favoring the education of disabled children in the regular education environment, alongside children who are not disabled. This requirement has traditionally been known as "mainstreaming," but is increasingly called "inclusion." Neither of these two terms is used in the IDEA.

Within this statutory framework, the Hearing Officer found on the first issue that the Board has met its burden of establishing by a preponderance of the evidence that its proposal to remove Mark from the regular classroom did not violate its obligation to educate him, to the maximum extent appropriate, with nondisabled children. To reach this finding, the Hearing Officer used a two part test developed in *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989). Although this test has been neither accepted nor rejected by the Fourth Circuit, it provides a logical framework for evaluating this issue. Under this test one first considers whether the student can receive educational benefit in the regular classroom with the use of supplementary aids and services. Second, if the fact finder concludes that placement outside the regular classroom is necessary for educational benefit, it must then decide whether the school has mainstreamed the child to the maximum extent appropriate.

In applying the first prong of the test, the Hearing Officer found that Mark cannot be educated satisfactorily when he receives all, or almost all, of his instruction and related services in the regular classroom, even with the use of supplementary aids and services. The factors used to make this finding were: the steps that the school had taken to try to include Mark in a regular classroom, a comparison between the educational benefits of the regular classroom and the educational benefits of the segregated, special education classroom, and the effects of including Mark on the regular classroom environment. Weighing into the Hearing Officer's decision on the first prong were her findings that although the Board made reasonable efforts to accommodate Mark in the regular classroom, he received virtually no educational benefit in the included setting and that Mark's behaviors were disruptive and had a negative effect on the environment in the classroom.

Moving on to the second prong of the test, the Hearing Officer found that the Board's proposal for a self-contained program which allowed for mainstreaming in all non-

academic activities gave Mark a significant opportunity to interact with nondisabled peers on a regular and daily basis, while offering him academic instruction and related services in a manner from which he would derive educational benefit.

Further, on the second issue, the Hearing Officer found that the proposed placement in a self-contained autism class, located in a regular education school and providing opportunities for interaction with nondisabled peers, would be appropriate and constituted the least restrictive environment. A placement is appropriate if it is reasonably calculated to provide educational benefit. *Rowley*, 458 U.S. at 206-07. The Hearing Officer determined that the self-contained autism class at Leesburg Elementary School, with mainstreaming for art, music, library, physical education and recess, was reasonably calculated to provide educational benefit for Mark. The findings relied on by the Hearing Officer were that the placement offered a structured program with a ratio of five students to one special education teacher and an aide, and that the classroom had instructional materials suited to Mark's learning style and offered break activities that would satisfy his sensory needs.

III. ANALYSIS

At the outset of this analysis, the Court must stress what this case is *not* about. Although seen by some as a battle between proponents of inclusion and separation, this case is solely about what is in the best interests of one disabled boy. The answer for Mark does not necessarily mean that the same answer would be appropriate for all other autistic children. The wisdom behind the IDEA is its unwavering focus on the individual disabled child and his or her unique challenges and needs. This Court has no doubt that specialized centers and separate self-contained classes may be the least restrictive educational environment for some children whereas inclusion may be the answer for others. Thus, this decision is in no way meant to reflect the Court's view of the adequacy of the self-contained autism class at Leesburg Elementary School or at

any other school. The decision in this case is limited solely to what is most appropriate for Mark Hartmann.

A. Obligation to Educate with Nondisabled Children

Although the Court finds that the Hearing Officer used the proper analytical framework to evaluate the Board's placement decision, the evidence in the administrative record, augmented by the evidence presented at trial, supports a different conclusion. The Board's proposal to remove Mark from the regular classroom did violate its obligation to educate him, to the maximum extent appropriate, with nondisabled children because the greater weight of the evidence establishes that Mark can receive and has received educational benefits when included in a regular classroom with the use of supplementary aids and services.

1. Reasonable Efforts to Accommodate

Although the Board initially made efforts to accommodate Mark's placement in a regular education classroom, these efforts were not sufficient to discharge its obligation under the IDEA. In the spring of 1993, the Hartmanns notified the school system that they were considering moving to Loudoun County, Virginia. (Transcript, Oct. 27 at 276).[4] The Hartmanns forwarded Mark's educational records at this time. *Id.* In June of 1993, the principal of Ashburn Elementary School, Laurie McDonald, approached a second grade teacher, Diane Johnson and asked whether she would be interested in having Mark join her class. Johnson indicated that she would be interested. (Tr. Aug. 15 at 106). The record shows that there was some confusion during the summer months as to whether the Hartmanns would actually move into Loudoun County. (Tr. Sept. 26 at 194, 232). Johnson, a regular education

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[4] References to the transcripts of testimony taken during the administrative due process hearing will be referred to as "Tr." followed by the month and day.

teacher, was not notified until the end of August that Mark would indeed be included in her class. (Tr. Aug. 15 at 105). Although Johnson had almost no experience dealing with autistic children, she was not offered any substantial training in autism or in the inclusion process. (Tr. Aug. 15 at 107). However, she was given help in accommodating Mark by having her class size reduced to a total of 21 students. Also, a full-time aide, Suz Leitner, was hired to work with Mark. (Tr. Sept. 26 at 194-97). The record does not reveal Leitner's qualifications.

Mary Kearney, the Loudoun County Director of Special education, was appointed to head the inclusion efforts. (Tr. Oct. 27 at 280-83). Kearney was chosen because of her experience with the Virginia Systems Change Project, a program in which she received training in inclusion. (Tr. Oct. 27 at 278). She also had some experience in developing educational programs for students who had been diagnosed with autism. (Tr. Oct. 27 at 279). Kearney was in charge of training the staff who would be working with Mark. This group became Mark's IEP team.[5] Initially, Mark's IEP team included his classroom teacher, Diane Johnson; his teacher's aide, Suz Leitner; the school principal, Laurie McDonald; and a speech and language pathologist, Carolyn Clement. None of them had any extensive experience working with an included autistic student. (Tr. Sept. 26 at 110). Their training in inclusion was limited to a one-day conference given by the Virginia Council for Administrators of Special Education.

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[5] IEP stands for "individualized education program." The IDEA requires that an individualized education program be developed for each child with a disability. The plan must be reduced to a written statement which includes the present levels of educational performance, annual goals and instructional objectives, the specific educational services to be provided, the projected dates for the initiation and duration of such services, and objective criteria and evaluation procedures. The IEP should be developed in meetings with an appropriate representative of the local educational agency, the teacher, the parents or guardians of the child, and whenever appropriate the child. 20 *U.S.C.* § 1401(a) (20).

(Tr. Oct. 27 at 286). This team was charged with the responsibility of coordinating and implementing Mark's placement. Although the Hearing Officer found this team adequate, the Court rejects that conclusion. Autism is far too complex a disability, and the inclusion of autistic children is too challenging a project, to leave to persons lacking adequate training and experience. Mark's failure to function well at Ashburn is strong proof of the inadequacy of the training and experience of Mark's IEP team.

During the fall, Kearney arranged for the IEP team to receive outside consultations from educational consultants Jamie Ruppmann and Gail Mayfield. Both of these consultants had expertise in the areas of autism and inclusion. According to Ruppmann's testimony, Kearney was concerned that the individuals on Mark's IEP team did not have sufficient experience with the challenge of including a disabled student such as Mark. (Tr. Sept. 27 at 154). Kearney asked Ruppmann to observe Mark in the regular education classroom, participate in the IEP meetings and offer suggestions to the IEP team. Ruppmann worked with the IEP team from November 2 to December 8, 1993. Mayfield visited Ashburn Elementary in November of 1993. Apparently, she gave advice regarding Mark's inclusion program, but she did not make an official report. Because Mayfield did not testify at the due process hearing and neither side offered any evidence from her, the value of her insights is not available. Only Ruppmann's testimony is in the record.

Kearney also involved Frank Johnson, Loudoun County's Supervisor of Special Education. Although Johnson had some experience working with autistic children in the 1970s, he had no experience working with an autistic child in a regular classroom setting. (Tr. Sept. 26 at 298-299, 302) Johnson became informally involved with Mark's placement during the first half of the year. Although Johnson did not attend meetings with the IEP team or observe Mark during this time, he did make himself available by phone to offer advice on how to develop strategies for dealing with Mark's behavior.

The record before the Hearing Officer shows that Kearney was concerned about the lack of experience of Mark's IEP team and tried to provide supplementary aids and services. Her efforts ceased, however, when she was removed from her supervisory role on Mark's IEP team in early December of 1993. The decision was announced at the December 8, 1993 IEP meeting. This meeting is a critical event in this case. There is some secrecy surrounding exactly what happened during the meeting. It is clear, however, that Ned Waterhouse, Director of Pupil Services, attended the meeting and that after this meeting Mary Kearney was no longer in a supervisory role on the IEP team and Jamie Ruppmann was no longer called in by the Board to participate in the IEP meetings.

Changes to the IEP team continued in 1994. Frank Johnson took on a more official role in January. He started to attend the weekly meetings and developed a behavior modification plan for Mark. Virginia McCullough, a special education teacher, was added to the team late in February, with little more than three months remaining in the school year. (Tr. Sept. 27 at 58, 108). McCullough had experience in implementing inclusion placements for preschool programs and providing one-on-one special education services in the regular classroom. Apparently she did not have experience with including children of Mark's age group. (Tr. Sept. 27 at 61). McCullough testified that when she began working with Mark she was also training the classroom teacher and the aide in methods of working with him. (Tr. Sept. 27 at 60). With just three months left in the school year, it was apparent that the individuals working with Mark still did not have sufficient training to give his placement a fair chance.

The Hartmanns point to the changes made to the IEP team as clear evidence that the Board was not strongly committed to inclusion. The Board counters that argument by pointing to, among other evidence, Johnson's testimony that at the time he was added to the IEP team, "staff from all over the county [was] involved in working with Mark to the point

where the teachers felt like they were overloaded." (Tr. Sept. 26 at 262). Although the Court finds these efforts laudable, they were insufficient.

The Court finds that the changes to the make-up of Mark's IEP team are evidence of the inadequacy of the Board's efforts to accommodate Mark in an inclusive setting. Mary Kearney has testified that before and after the December IEP meeting she was committed to inclusion for Mark. (Tr. Oct. 27 at 290-91) She made efforts to provide adequate services to make Mark's placement a success. Jamie Ruppmann testified that Mark's needs are best met in an inclusive setting because, among other considerations, he would benefit from being around normal verbal children. (Tr. Sept. 27 at 203, 210,-213). Ruppman was in favor of inclusion for Mark. She worked closely with the IEP team during the first half of the school year and continued to provide support afterwards when the Hartmanns hired her as their educational advocate. Moreover, Johnson appears to the Court to be a philosophical opponent of inclusion. He testified in regards to Mark's academic progress, "I think there has been no progress academically in the inclusive settings. I see no evidence in the records that there's been any progress whatsoever." (Tr. Sept. 26 at 287).

It is obvious that by the middle of the school year, the Board had decreased its efforts to make Mark's inclusion program successful. The record before the Hearing Officer demonstrates how Mark's behavior became increasingly disruptive, with many temper tantrums and physical outbursts. The Hartmanns argue that these problems were the result of Mark's frustration. Although Mark's behavior regressed through the school year, the Board removed Mary Kearney from a supervisory role and stopped utilizing the services of outside consultants, until after Mark's IEP was changed to the self-contained program. The personnel changes and the cessation of supplementary consulting services by inclusion experts are key factors that convince the Court that the Board was no longer committed to Mark's inclusion. No autistic

student had been fully included at Ashburn Elementary School before Mark. Mark was, in essence, a test case for Loudoun County. However, because there is abundant unequivocal evidence that other school systems have been able to educate Mark in the inclusive setting, the only conclusion is that the Board simply did not take enough appropriate steps to try to include Mark in a regular class.

2. Comparison of Educational Benefits

The Hearing Officer also found that the record did not establish that Mark received any educational benefit in an included setting and that Mark learns best when he is being taught in a one-to-one setting.

It is unclear to this Court how the Hearing Officer arrived at her conclusion that Mark did not learn anything while in an inclusive setting. Mark's disability significantly affects his ability to communicate. The record shows that Mark cannot be tested under standard conditions, yet the Hearing Officer appears to have discounted any evaluations based on adapted testing. This approach dooms Mark to constant failure.

The Hearing Officer notes that in assessing the educational benefit from regular education, the *Daniel R.R.* court looked at "the student's ability to grasp the essential elements of the regular education curriculum." 874 F.2d at 1048. At the second grade level the essential elements are basic math, reading and writing skills. Mark's teacher at Ashburn Elementary, Diane Johnson, testified that she did not think that Mark was learning in her class and she doubted that Mark had the ability to do math or read.

However, Cathy Thornton, a tutor hired by the Hartmanns who worked with Mark after school during the 1993-94 school year, testified to the contrary. While tutoring Mark, Thornton was also employed by the Fairfax County public school system as a special education teacher for autistic students in a self-contained setting. Thornton made adaptations to standardized tests and was able to administer a

portion of them to Mark. She concluded from this testing that Mark is not mentally retarded and is capable of making educational progress. She also testified that Mark does have the ability to do math and initiates social interaction. She observed that his attention span from ten minutes to forty-five minutes when engaging in an academic activity. (Tr. Aug. 15 at 170, 174).

Because Thorton appears to have no educational bias, the Court found her evidence to be especially credible and is perplexed by the Hearing Officer's failure to give this evidence due weight.[6] She may well be the witness with the most hands-on experience educating autistic children. She testified to having eleven years of special education experience with at least one autistic child in her class each year. For the past five years she has taught in a Fairfax County autistic program in a self-contained classroom. (Tr. Sept. 28, at 141). She obviously has an open mind about the most appropriate setting for autistic children. For example, she testified she believes one student in her class would benefit from an inclusion program while the rest of her students belonged in the self-contained setting. (*Id.* at 178).

Thornton's evaluation of Mark's potential was corroborated by Kenna Colley, an inclusion specialist teacher who has been working with Mark at Kipps Elementary School in Montgomery County, Virginia. She testified that by the end of fourth grade Mark could independently do simple addition skills and was working on subtraction skills. Colley also testified that Mark engaged in social interaction with his classmates. He would bring things over to them in class, dance with them in music class and sled with them after school. Colley believed that Mark knew his classmates by name as evidenced by his properly pointing to a picture of a classmate when given a name and asked who the person was.

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[6] The Hearing Officer also failed to give any weight to the previous education of Mark in an inclusion setting in Illinois.

Patrick Schwartz, an autism expert hired by the Hartmanns to observe Mark in his classroom, testified that based on his observations he determined that Mark had an attention span of approximately fifty minutes. Beverly Strager, Mark's fourth grade teacher at Kipps Elementary, testified at trial that Mark did make educational progress during the year in her regular education classroom. Similarly, Greg Paynter, Mark's fourth grade aide at Kipps Elementary, testified at trial that Mark made educational progress over the year and was able to work independently on adapted academic lessons by, for example, answering questions about a subject by selecting the proper answer from a word bank.

Besides the testimony of several Montgomery County, Virginia, educators concerning Mark's successful inclusion in their program, the Court also observed at trial a video tape taken of Mark over a two-day period. That tape contains the best evidence of Mark's educational accomplishments because it shows Mark himself. For example, the Court saw Mark correctly point to a picture of Monticello out of a series of choices when asked for the home of Thomas Jefferson. He was able to point correctly to pictures of the appropriate coins when asked to give his aide 35 cents. As for Mark's behavior, outside of some cooing noises and limb movement, Mark exhibited no more disruptive behavior than his classmates. There was no evidence of uncontrollable behavior. Mark learned to tolerate change better. For example, he was no longer afraid of the lunch room, and was able to cope with calendar changes. He interacted better with peers and was sometimes seen to mimic smiles of classmates. He correctly labeled pictures of the school gym and playground.

The Board's witnesses tried to diminish the value of these accomplishments by essentially testifying to all the age appropriate things Mark does not appear to be doing. Although no witness claimed that Mark was working at his age level, as plaintiffs correctly argue, Mark is learning in the inclusive setting and he has more chance of fulfilling his

unknown potential in such a setting than in the less enriched one of the self-contained class.

If Mark were placed in the self-contained autism class at Leesburg, he would be competing with five other autistic students for the attention of the special education teacher and the aide, he would not be exposed to a large number of verbal, normally social students whose behaviors he could pattern and he would not get the academic content he is presently receiving.

3. Effect on the Regular Classroom Environment

The Hearing Officer found that Mark engages in very disruptive behavior which has a negative effect on the environment in the classroom. She noted that while this factor standing alone would not be sufficient to justify removing Mark from the classroom, it weighs in with the other factors and contributed to her determination that it would be proper to remove Mark from the inclusion setting.

The record demonstrates that Mark had some behavioral problems at Ashburn Elementary. For example, Frank Johnson was contacted by phone early on to suggest behavior modifcation strategies. However, Johnson did not have any significant experience with teaching autistic children. When his credentials are compared with those of Thornton, Ruppmann, and Kearney it is obvious that he would be unable to come up with successful strategies. Although the problems continued, a behavior modification plan was not developed until February, 1994. Cathy Thornton testified that she did not have problems with Mark's behavior during their tutoring sessions that year after school. Moreover, after Mark left Ashburn Elementary his behavior greatly improved. His Montgomery County, Virginia, fourth grade teacher, Beverly Strager, testified that Mark had a mild level of distractibility but never interfered with her teaching. She stated that when Mark made noises he would follow her instructions or the instructions of his classmates to quiet down. His aide, Greg Paynter, testified that Mark's behavior

improved throughout that year, except during the period around the time when his mother became ill.

Given the strong presumption for inclusion under the IDEA, disruptive behavior should not be a significant factor in determining the appropriate educational placement for a disabled child. In Mark's case, there is strong evidence that his behaviors do not have a negative impact on his current environment. The videotape showed Mark engaging appropriately in many different activities: preparing for the day by taking the chairs off the desks, having lunch with his classmates, looking through a book with a classmate, working on the computer, raising his hand in response to a question by his teacher, and working one-on-one with his speech and language teacher. At no time did Mark's behavior become a disruption in the classroom. He seems to function as an integral member of the class. He also seems to take directions very well. In one instance Mark became tired and took a break by lying on the floor while working with his speech and language teacher. As soon as the teacher indicated that the break was over, Mark returned to his seat and resumed working. This evidence, together with evidence that Mark has made educational progress in an included setting, favors an included educational placement for Mark.

Considering that the efforts made by the Board to successfully accommodate Mark's placement decreased over the 1993-94 school year, this Court finds that Loudoun County Public Schools violated its obligation under the IDEA to educate Mark, to the maximum extent possible, with nondisabled children.

B. Appropriateness of the Proposed Placement

The Hearing Officer addressed the second issue regarding the appropriateness of the proposed placement after her determination that Loudoun County had not violated its duty under the IDEA. This Court, having found a violation of the IDEA, need not address this issue but shall address it briefly for the sake of completeness.

The Board's proposed placement of Mark in a self-contained autism class would not be appropriate. The evidence demonstrates that Mark's greatest need is to improve his communication skills. The best environment for developing these skills is with children who communicate normally. Moreover, mainstreaming opportunities provided during the "specials," such as physical education, music, art and library classes, would not be appropriate for Mark. As Dr. Swart testified, these classes are less structured than core classes. Because Mark needs structure, he would not achieve the same improvements in his communication skills if the only mainstreaming opportunities provided were during unstructured and often chaotic classes.

Schwartz also testified that taking Mark out of his normal, included setting and placing him in the self-contained class would not be appropriate and would be a setback. This is because in the self-contained classroom there are fewer routines, much less student initiation, and very limited interaction with age-appropriate peers. Kenna Colley testified that inclusion is very important for Mark if he is to learn skills necessary for his future. Such skills include how to stay on a task and engage in social interaction and certain academic skills. Colley believes that inclusion has been beneficial to Mark because his social skills have improved and his self-esteem has been heightened.

There was much discussion at trial about the skills important for Mark's future. Witnesses for the Board testified that Mark needs to focus on life skills including skills involving interaction in the community, such as going to the store or riding public transportation. There is unrefuted evidence that Mark is receiving such opportunities at home. Joseph Hartmann testified that he and his wife spend a lot of time teaching Mark about the community. Mark is often taken to the library, grocery store, book store and similar places. He was taught how to ride a bus. Further, Mark has been taught at home to complete tasks such as doing the dishes and taking out the garbage. Because Mark gets

abundant training in life skills at home, this should not be the focus of his academic curriculum.

CONCLUSION

For the foregoing reasons, the Court REVERSES the decision of the Hearing Officer regarding the appropriate program and placement for Mark Hartmann. The Court finds that if the Board implemented its placement plan it would violate its duty under the IDEA to educate Mark, to the maximum extent appropriate, with children who are not disabled. The Court also finds that the Board's efforts to include Mark were inadequate because the Board failed to follow the advice of properly qualified experts like Ruppmann and Kearney, and instead placed staff on the IEP team who had inadequate training and experience, thereby dooming their inclusion efforts to failure. Therefore, judgment is entered in favor of plaintiffs and an appropriate Order will issue enjoining further violations of the IDEA and the Rehabilitation Act. Plaintiffs are awarded reasonable attorneys' fees and costs pursuant to 20 U.S.C. 51415(4)(b), for both this matter and the administrative proceedings.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

Entered this 27th day of November, 1996.

/s/ Leonie M. Brinkema

Leonie M. Brinkema,
United States District Judge

Alexandria, Virginia

IN THE UNITED STATES DISDTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Filed: DEC 16 1996

MARK HARTMANN, a minor
by his parents and next
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and JOSEPH HARTMANN,

Plaintiffs,

v.

LOUDON COUNTY BOARD OF EDUCATION,

Defendant.

Civil Action No. 95-1686-A

SUPPLEMENTAL MEMORANDUM OPINION

In defendant's Memorandum in support of Motion for Stay of the Court's Order of November 27, 1996, defendant contends that the Court did not consider the Reviewing Officer's Decision of May 13, 1995. To clarify the record, the Court did consider the Reviewing Officer's Decision which was in effect a re-affirmation of the Hearing Officer's Decision of December 21, 1994 with the exception that the Reviewing Officer directed the Board to amend the May 31, 1994 IEP to provide Mark with adaptive physical education instruction in the regular physical education class at Leesburg Elementary School. In all other respects the Reviewing Officer "specifically approve[d] the Findings of Fact and the legal analysis of the decision of the Hearing Officer."

Therefore, for the reasons stated in the Memorandum Opinion of November 27, 1996, the decisions of the Hearing

Officer and the Reviewing Officer are reversed and judgment is entered in favor of the plaintiffs.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

Entered this 16th day of December, 1996.

/s/ Leonie M. Brinkema

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

VIRGINIA DEPARTMENT OF EDUCATION
ADMINISTRATIVE APPEAL

JOSEPH AND ROXANN HARTMANN

Appellants,

v.

LOUDON COUNTY PUBLIC SCHOOLS

Appellee.

In Re: Mark A. Hartmann

Pursuant to the January 5, 1995 appointment by the State Department of Education, this Reviewing Officer has conducted a review of the August 15, September 26, 27, 28 and October 27, 1994 due process hearing and the December 21, 1994 decision of the Hearing Officer. The January 5, 1995 appointment set February 4, 1995 as the decision date but in response to the parties' joint motion for extension of time to file briefs, the decision date was extended until May 8, 1995. Such extension was found to the in the best interest of Mark A. Hartmann ("Mark").

Pursuant to Section 3.4(A)(11)(a) of the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, I have examined the entire hearing record, asked the parties if they desire to present additional evidence, afforded the parties an opportunity to present oral or written argument and advised the parties of their right to be represented by counsel. The parties, both ably represented by counsel of their choice, did not request that additional evidence by taken except that counsel for the parents submitted a tape of Mark in his classroom at Ashburn Elementary School and both parties submitted a copy of Mark's IEP from the Montgomery County Public Schools. The tape and the complete final IEP submitted by parent's counsel are submitted as Hartmann Exhibits 87 and 88. The parties requested the opportunity to brief the appeal and I have reviewed in detail the Hartmann's brief, the school system's brief and the Hartmanns' reply brief

together with the briefs submitted by the parties to the Hearing Officer.

From my review of the record, I conclude that the procedures at the hearing were consistent with the requirements of due process.

The Reviewing Officer is to make an independent decision based upon a preponderance of evidence in the record as it exists, or as supplemented. Reg. 3.4(A)(11)(a)(6). There is no presumption in favor of the party who prevailed before the Hearing Officer. The School system's assertion that the Reviewing Officer in this case must uphold the decision of the Hearing Officer is not well founded and is based upon a misreading of *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1992).

The school system argues that the appeal should be dismissed for lack of jurisdiction because Mark has now enrolled in the Montgomery County, Virginia public schools. Mark's father continues to reside in Loudon County and the Hartmanns own a house in Loudon County. Despite Mark's recent enrollment in the Montgomery County school system, it is not unlikely that Mark will once again be enrolled in Loudon County public schools. The issue is thus capable of repetition. A dismissal of the case now due to Mark's move would lead to the issue not being reviewed. In other words, this is the classic case of "capable of repetition, yet evading review." The appeal is not dismissed due to Mark's transfer to the Montgomery Country school system. *Lee v. Biloxi School District*, 18 1DELR 1198, 1199 (5th Cir. 1992).

After making an independent review of the record, I reach the same decision as that of the Hearing Officer in all respects except that Loudon County is directed to amend the May 31, 1994 IEP to provide Mark with adaptive physical education instruction in the regular physical educatin class at Leesburg Elementary School. I specifically approve the Findings of Fact and the legal analysis of the decision of the Hearing Officer.

The Hartmanns contend that the school system did not make a reasonable effort to accommodate Mark and that if they

had provided additional and more appropriate supplemental aids and services, he could have been educated satisfactorily in the regular second grade classroom. There were clearly some differences between the supplementary aids and services provided Mark in Illinois in first grade and by Loudon County in second grade but that is only to be expected. The experience and training of the personnel of different school systems differ somewhat. Loudon County made a concerted good faith effort to educate Mark in the regular second grade classroom with appropriate supplemental aids and services but was not successful.

Mark did not progress academically in the second grade despite all the efforts made by the school personnel. Both the Hartmanns and the school system are dissatisfied with Mark's academic progress in second grade. The Hartmanns contend that if additional and more appropriate supplemental aids and services are provided, Mark can make academic progress in the regular classroom and they point to his first grade experience in Illinois.

Although the first grade experience was a relatively positive one for Mark, it became clear during the course of the second grade that Mark's academic skills were not as advanced as the Illinois school system thought. Mark cannot read and cannot add yet the Illinois teachers thought he was reading at first grade level and progressing in the first grade with math workbook. His quick memorization, his counting ability, his facile use of a computer and tests based on the almost certainly bogus technique of facilitated communication all masked his academic deficits. Mark apparently did not make the academic progress in first grade the records forwarded to Loudon County from Illinois indicated and he did not progress academically in second grade.

The evidence is overwhelming that when the attempt is made to teach Mark new concepts, Mark screams, exhibits difficult behaviors and expresses unhappiness. Mrs. Hartmann even testified that Mark is not a problem at home because the family tries to avoid things that will make Mark be destructive,

unhappy or not be content. 10/27/94 tr., p.181. If Mark is to progress academically, he will be forced to confront new and difficult tasks which will lead to destructive and noisy behavior that cannot be tolerated in the regular classroom and that can only be avoided if he is baby sat, not taught. If Mark is to progress academically, he needs one to one instruction in a small group setting where the teacher can control and moderate the difficult behaviors caused by concerted attemps to teach Mark new material.

The Hartmanns also contend that removal of Mark from the regular classroom after one school year is premature. How many unsuccessful years in school must a child undergo before a placement is changed? Mark lost a year academically and attempting a change in placement after an unsuccessful year is reasonable and appropriate. Failing to initiate a change in placement after Mark's lack of success in second grade could be construed as failing to provide Mark an educational program reasonably calculated to provide him educational benefit.

The Hartmanns contend that Mark models his peers and that the proposed IEP does not provide for sufficient interaction with non-disabled peers. There is conflicting evidence on this point but it is clear that the modeling behavior is not substantial. Including Mark with a regular third grade class in the "specials" (art, music, library, physical education and recess) will allow some peer modeling to continue as would Mark's participation in school lunch, if the Hartmanns would consider allowing him to remain at school for lunch.

Everyone at Ashburn made extraordinary efforts to accommodate Mark's presence in the regular classroom and to attempt to control, or ignore, his difficult behaviors. On balance, and despite the fact that Mark's presence was a learning experience for Mark's classmates, the disruptive effects of Mark's behavior did have a negative impact on the other children in the classroom. The Hearing Officer sensibly concluded that considered by itself, Mark's behavior might not be enough to justify removing him from the regular classroom, but that it does come into balance as a negative. I conclude

that as work for the other children becomes more advanced and demands their greater attention and Mark is introduced to new concepts which he finds difficult and unwelcome, Mark's behavior will only become more difficult and interfere more with the learning of the other children.

The self contained program at Leesburg Elementary with mainstreaming for music, art, library, recess and physical education [and lunch if the Hartmanns agree to such] is an appropriate placement for Mark reasonably calculated to provide him educational benefit. All agree that Mark needs one on one instruction to make academic progress. Placement in a class with four other children, a trained special education teacher and an aide gives Mark a much greater chance for one on one instruction than placement with an aide in a regular classroom where the regular education teacher must concentrate primarily on the twenty plus other children. Unless the aide is a certified special education teacher acting as a personal teacher to Mark, Mark will not receive more one on one instruction in the regular classroom than in the self contained classroom. No one argues that Loudon County must hire a certified special education teacher just for Mark.

The parents contend that the benefits of the self contained program are unproven. Little in the way of education for an autistic child is proven but the lack of academic benefit to Mark of inclusion in the regular classroom with appropriate supplemental aides and services has been proven during Mark's second grade year at Ashburn.

The Hearing Officer directed that Mark's IEP reflect objectives for Mark related to his mainstream participation; reflect that Mark is always accompanied by a teacher or aide in the mainstream environments until such time as he can demonstrate an ability to be there independently and reflect that Mark have his specials with the same regular education class. I affirm these directives.

Mark's IEP in winter and spring 1994 states that "Adaptive P.E. objectives will be added by 4/1/94." The Hartmanns contend that no adaptive physical education was

provided to Mark and the evidence bears out their contention. The May 31, 1994 IEP at issue here does not speak directly to adaptive physical education. The evidence also shows that Mark has benefited in the past from adaptive physical education. I direct that the IEP reflect that Mark is to be provided, at least once a week, with adaptive physical education instruction in the regular physical education class at Leesburg Elementary School to maximize Mark's benefit from such class.

With the one additional requirement of adaptive physical education instruction as set forth above, the opinion of the Hearing Officer is affirmed in all respects.

Date: 5/3/95

/s/ Alexander N. Simon

Alexander N. Simon
Reviewing Officer

Certificate of Service

I hereby certify that I sent, by first class mail, postage pre-paid, the original of the above styled review to Ms. Judith Douglas, Associate Director, Officer of Special Programs, Division of Compliance, Commonwealth of Virginia, Department of Education, P.O. Box 2120, Richmond, Virginia 23216-2120, and a true copy of the above styled review to Gerald S. Rugel, Esquire, 297 Herndon Parkway, #104, Herndon, Virginia 22070, Mr. Joseph Hartmann, 20751 LaPlume Place, Ashburn, Virginia 22011, Mrs. Roxanna Hartmann, 750 Tall Oakes Drive, # 2100-C, Blacksburg, Virginia 24060, Kathleen S. Mehfoud, Esquire, Hazel & Thomas, P. O. Box 788, Richmond, Virginia 23206 and to Dr, Edgar Hartrick, III, Superintendent, Loudon County Public Schools, 102 North Street, N.W. Leesburg Virginia 22075, this *3rd* day of May, 1995.

/s/ Alexander N. Simon

LOUDOUN COUNTY PUBLIC SCHOOLS

DUE PROCESS HEARING

IN RE: MARK H.

DECISION

INTRODUCTION

The issue in this due process hearing is what is the appropriate program and placement for Mark Hartmann. The parents want Mark to remain in the regular education classroom of his neighborhood school with his nondisabled age peers. The school system initiated due process proceedings seeking to change Mark's placement to a self-contained autism class in a regular education school with mainstreaming for lunch, recess and nonacademic subjects. The school system maintains that Mark cannot be educated satisfactorily in the regular classroom, even with the use of supplementary aids and services.

For reasons that are more fully set forth below, I find that the school system has established that Mark cannot be educated satisfactorily when he receives all, or almost all, of his instruction and related services in the regular classroom, even with the use of supplementary aids and services. I further find that the proposed placement in a self-contained autism class, located in a regular education school and providing opportunities for interaction with nondisabled peers is appropriate and constitutes the least restrictive environment.

BACKGROUND

Mark Hartmann is a nine-year old boy eligible for special education services due to a disability of autism, with an accompanying speech and language disorder. During the 1993-94 school year, Mark was placed as a fully included student at his neighborhood school, Ashburn Elementary

School, under an IEP from an Illinois school district in which Mark had been educated for the prior two years. In

June 1994, Loudoun County Public Schools (LCPS) advised the parents of its decision to change Mark's placement from inclusion at Ashburn to the self-contained autism class at Leesburg Elementary School. The parents did not agree to the change of placement, and the school system initiated this due process proceeding.

The hearing began on August 15, 1994, and was held at the Douglass Support Facility in Leesburg, Virginia. The hearing was continued to September 26, 27, 28 and October 27, 1994. At the request of the parents, the hearing was open and the testimony and exhibits are a matter of public record. The parents were present throughout the hearing and were represented by counsel, Gerard S. Rugel. The school system was represented by counsel, Kathleen S. Mehfoud, and by LCPS representative, Ned D. Waterhouse, Director of Pupil Personnel Services, LCPS. The parties did not wish witnesses to be sequestered, and the witnesses were, therefore, free to attend all or part of the hearing.

POSITION OF THE PARTIES

The School System

LCPS asserts that Mark does not derive educational benefit from receiving education in the regular education classroom. Because of his disability, he requires instruction in a quiet structured environment from professionals experienced in methods of special education. He has made no academic progress during his time of full inclusion. He also derives no significant benefit from being with his nondisabled peers. He does not initiate any interaction with them, he does not model their behavior, and in fact, seems indifferent to their presence. Mark's presence is very disruptive due to his constant vocalization, repeated screeching and screaming, and a host of other problem behaviors including crying, whining, kicking, pinching, biting, hitting, lying on the floor, removing his clothes and putting his pants inside his pants to hold his penis.

In addition, Mark takes too much teacher time away from the other students. LCPS made every reasonable effort to include Mark and the conclusion is that he cannot be educated satisfactorily in an fully included setting. The proposed placement is appropriate for Mark. It affords him placement in a group of five students with a trained special education teacher and aide, in a setting designed to suit his learning style and his sensory needs.

Parents

The parents contend that Mark should receive all, or almost all, of his instruction and related therapies within the regular education classroom. In their view, the law requires that Mark be educated in the regular classroom with such supplementary aids and services as will enable him to be educated satisfactorily. They believe that Mark has made progress in the included setting and that the unsatisfactory elements of Mark's performance relate to the failure of LCPS properly to implement his placement. If his curriculum is properly modified, he will not get frustrated and he will be able to make meaningful progress.

Mark's exhibits certain nontypical behaviors that are related to his disability. Most of these behaviors are communicative. His vocalizations express his feelings as do his frustrated, aggressive behaviors such as hitting or kicking. While these behaviors, might seem random and meaningless, they have meaning for Mark and a proper behavior management program would discern that meaning and devise an appropriate strategy to minimize or eliminate the behavior.

As is typical of persons with autism, Mark is impaired in his social relationships. Although he does not typically initiate interaction, he does model and interact with other children. Through his placement in the regular classroom he has learned some social skills.

Mark's education at Ashburn has not been satisfactory because the staff has not implemented it properly. The staff had no expertise or experience in inclusion or autism. They

were not provided the necessary supports or training to enable them to work with Mark in a successful way. Mark was not given the supplementary aids and services necessary for his success. LCPS did not make reasonable efforts to accommodate him in the regular classroom. The teacher and aide were untrained in inclusion and in autism. They were not given the necessary assistance in modifying the curriculum for Mark. They did not develop a behavior management plan.

The included setting provides significant and proven benefits for Mark. He has benefited from the interaction with his nondisabled peers. He has learned to model their behavior in such matters as following the daily routine and hanging up his backpack. He has also grown in his ability to interact with others, especially peers.

The segregated setting, on the other hand, offers unknown and unproven results. Mark cannot learn appropriate social and communication skills in a program where his only peers are four children with autism, each of who has serious communication impairments of his or her own. The mainstreaming opportunities provided in the proposed program are unstructured and will not provide a meaningful opportunity for social interaction and peer modeling.

The negative effects on other children has been distorted by the school system. The other children learned to tune out Mark's noises and continue with their work. Mark has a positive effect on the other children, teaching them to accept differences. If the classroom teacher spent too much time on Mark, that is because she was not adequately supported. The curriculum modifications required for Mark should be provided by an inclusion specialist.

The appropriate program for Mark is full inclusion in the regular education third grade classroom at his neighborhood school. Although this does not mean that every minute of his program must be delivered in the regular class, it is expected that the vast majority of it, in fact, would be in the regular class.

FINDINGS OF FACT

1. The parents received the notice required under sec. 3.4(A)(1)(d) and (e) of the Regulations Governing Special Education Programs for Children with Disabilities in Virginia.

2. Mark is a nine-year old child with a disability who requires special education and related services for him to benefit from his education. His primary disability is autism and his secondary disability is speech and language disorder.

3. Autism is a complex disorder associated with varying levels of impairment in several areas. An autistic individual may exhibit, in varying degrees, some or all of the following characteristics: impairment in social interaction; impaired ability to imitate others; preference for solitary play; difficulty in forming friendships; trouble with eye contact; disturbance in reaction to sensory stimuli; impaired verbal and nonverbal communication; low cognitive functioning level; need for structure; difficulty in accepting change; preference for repetitive patterns of handling objects; absence of imaginative play.

4. Mark was first identified as a child with a disability and found eligible for special education in March 1988; he has been receiving special education services since that time. His placement history is summarized as follows:

a) For the academic years 1988-89 and 1989-90, he attended a self-contained preschool program in Newport News, Virginia, with speech and language therapy.

b) In July 1990, the family relocated to Illinois. For the 1990-91 school year, Mark was placed at the Little Friends Academy, a private special education day school, where he was in a self-contained preschool program and received related services, including speech and language therapy, occupational therapy, and adapted physical education.

c) In Spring 1991, the parents began exploring a placement for Mark at Butterfield Elementary School, his own neighborhood regular education school. By September

1991, a program was developed for Mark to be dual enrolled. For the 1991-92 school year, he attended Krejci Academy in the morning (the name of Little Friends had been changed) and he was included in the regular afternoon kindergarten at Butterfield. At Butterfield, he had the assistance of a one-on-one aide and he received speech and language therapy. This program was viewed as a transition to full inclusion at Butterfield.

d) For the 1992-93 school year, Mark was fully included in the regular education first grade at Butterfield. There he had a full-time instructional aide and received speech, 60 minutes a day, occupational therapy, 60 minutes per week, and adapted physical education, three times per week.

e) In September 1993, Mark enrolled at Ashburn Elementary School in the regular second grade pursuant to an IEP developed at Butterfield, as an interim placement, pending an LCPS eligibility determination. In accordance with the terms of his IEP, Mark's 1993-94 placement was in a regular second grade classroom with the assistance of a full-time aide. He also received one hour per day of Speech and 30 minutes per week of Occupational Therapy.

f) From September 1994 to the present, pursuant to the stay-put provision of the Individuals with Disabilities Education Act (IDEA), Mark continues with his last agreed-upon placement, that is as an included student in the regular education third grade at Ashburn Elementary School.

4. Mark is very affected by many of the impairments typically associated with autism. He has no oral speech and he lacks a consistent communication system for identifying his needs and wishes for others. His receptive language is considerably stronger; he understands and responds to many commands and other communications.

Mark's cognitive functioning is quite depressed, but his true ability in this area is not known. Due to his disability he is untestable under standardized conditions. Even when test instruments are adapted for him, the results yielded do not necessarily reflect his ability. The school system's assertion

that Mark is mentally retarded was not established. When Mark does not perform a test item, the reason is not known. It may be because he does not have the receptive language skills to understand the question, he does not have the expressive language to communicate the response or he simply does not feel like doing the item. Until Mark succeeds in expanding his expressive language skills, any opinion about Mark's cognitive ability is speculative. His reported competence in certain technical tasks, such as computer and video equipment operation, and testing reports submitted by the parents indicate that he should be viewed as being in the average range for cognitive ability until a more definitive determination can be made.

Mark is very impaired in his social interactions. At least outside of the home setting, Mark does not initiate social interaction. He avoids eye contact and does not engage in any play with other children. He signals hello and goodbye only upon prompting.

Because of sensory system irregularities, Mark seeks tactile stimulation through such activities as rubbing elbows of people working with him, filtering small objects, such as rice, beans and mulch through his fingers, and tossing and stroking objects such as stuffed animals. His mother reports that it is very relaxing for Mark to shower and bathe because of the response of his sensory system to these activities. He also responds well to massage of his back.

5. LCPS personnel were enthusiastic about including Mark at Ashburn. They made a substantial effort to provide supplementary aids and services for Mark to enable him to benefit from inclusion in the regular education classroom. Ashburn Principal Laurie McDonald testified that the class to which Mark was assigned was reduced from 26 to 21 and it was composed of second graders who tended to be more independent and higher functioning than other second graders. Ms. Diane Johnson, the second grade teacher, was chosen for Mark because of her excellent teaching abilities. A full-time one-on-one aide, Ms. Suz Leader, was hired for Mark. He

received 5 hours per week of speech and language therapy from Ms. Carolyn Clement. Johnson, Clement and Leader worked closely together to coordinate and share information regarding Mark's placement. Ms. Johnson and Ms. Leader received training in facilitated communication, a communication system that Mark had been using in Illinois. Ms. Clement was familiar with facilitated communication and obtained advanced training through a consultation with an outside expert in the use of this model.

Their efforts were under the supervision of the Director of Special Education, Ms. Mary Kearney. Ms. Kearney has extensive training in inclusion, having participated in an inclusion project, known as the Virginia Systems Change Project. She provided an inservice training on inclusion for the staff and Ashburn. In October, she also arranged for Mark's team, Ms. McDonald, Ms. Johnson, Ms. Leader and Ms. Clement, to attend a full-day off-site workshop on inclusion. During the Fall, LCPS personnel working with Mark also obtained consultations from educational consultants Jamie Ruppman and Gail Mayfield. Mr. Frank Johnson (no relation to Diane Johnson), the Special Education supervisor of the county's programs for autistic children was also involved, especially with questions about managing Mark's behaviors. Mark's behavior was identified early on as a challenge and Mr. Johnson's advice was sought in developing strategies for dealing with Mark's challenging behaviors. The curriculum for Mark was continually adapted or modified until his level of functioning was identified.

The parents argue that at some point LCPS began to withdraw support. I do not find this to be the case. Halfway through the year, the school system added support when Virginia McCullough was assigned to the team to provide direct and consultative special education services. Frank Johnson also assumed a more formal role as a team member at about the same time. It should also be noted that, rather than withdrawing support for Mark's placement at Ashburn, the team recommended that it be continued at the time of the

Ashburn IEP in March 1994. The parents point to evidence that LCPS personnel had some questions and concerns about the placement during the year as demonstrating a lack of commitment to the effort. I infer no lack of commitment from an ongoing consideration of the success of Mark's programming.

6. Mark's reading skills are at a pre-kindergarten level. He is able to place letters of the alphabet in order, fill in missing letters of the alphabet, match upper case letters to lower case letters, match words to the same word, and copy words typing independently on his Canon Communicator, a keyboard like communication device. Mark does not know letter sounds, except for initial B, D, and P.

In math, Mark understands counting. He can fill in missing numbers on a numberline that goes up to 100. He cannot add with symbols, i.e. "2 + 3 = 5," but he can derive sums less than ten by counting two sets of objects on a numberline. He is working on the concept of subtraction.

7. Mark learns best in a 1:1 setting. He is easily distracted by noise and visual stimulation. Mark has a relatively short attention span and needs frequent breaks. Marks learns by repetition and by practice. He requires a lot of structure and is disturbed by unanticipated changes.

8. Mark exhibits many behaviors associated with autism, many of which are deemed undesirable. These behaviors are inappropriate in a regular classroom setting. His misbehaviors include continual vocalization, especially whining, screeching and crying when unhappy or frustrated, hitting, pinching, kicking, biting, sucking the leg of a chair, rolling on the floor, and removing his shoes and clothing. Mark is a big strong child who cannot be easily restrained when he engages in injurious behaviors such as hitting, kicking, pinching and biting. His continual vocalizations are distracting and make it difficult for other children to stay on task. When Jamie Ruppman observed Mark in his classroom, she observed two instances of significant disruption, in which he threw himself on the floor. She noted that it in each instance it took about

five to eight minutes to get Mark settled down. His loud screeching outbursts, which occur daily, take the attention of the teacher and the aide to redirect him; these outbursts also take the other children off task and they then have to be redirected. Mark hits and pinches others several times a day. He is most likely to exhibit these behaviors when he is frustrated by material that is new or difficult or which he does not want to do. When Mark is presented with tasks that are easy for him, he is generally more compliant.

9. Mark requires a disproportionate amount of the time of the regular classroom teacher. Ms. Johnson testified that some children who needed extra time in Mark's class last year did not get what they needed because Mark got any extra time that she had. Ms. Fatz, Mark's third grade teacher, stated that she spends about one hour a day modifying curriculum and planning for Mark.

10. Mark does not exhibit awareness of or interest in his peers in school. He does not initiate communication or any form of interaction with them. He does not model their behavior. He performs classroom routines such as getting in line and hanging up his backpack from memory and with the assistance of verbal reminders. He waves hello and goodbye only with verbal reminders. He will return a high-five greeting to a classmate. Mark has learned to comply with many of the routines and behaviors required in the regular education classroom.

11. Socially, Mark remained quite isolated. His peers were fond of Mark, interested in him, eager to participate in classroom activities with him, and protective of him. Mark did not initiate social interaction with his peers. Despite teaching and prompting, he is unable to identify any of his classmates by name. He is able to learn a routine, but he does not model the behavior of his peers. He is unaware of their presence and does not notice a difference if they are not present. He can usually tolerate the presence of other people, but he is also apt to push, pinch or hit someone who is in his space.

12. Mark was not able to work on any of the same skills that second graders worked on last year and the same is true with respect to his third grade classmates this year. Mark was placed in a small reading group, but did not read along with the group. He was not able to answer comprehension questions when a story at the Grade 1.6 reading level was read aloud to him. He was kept in the small reading group, but he spent that time copying the reading words on his Canon Communicator. This was not deemed a very good use of his time, but there was no effective was to modify or adapt that activity for Mark. Mark did not enjoy Science, Social Studies or Health; they were taught in the afternoon, described as his "crankiest" time of day. Those lessons were adapted for Mark by directing him in such activities as cutting and pasting pictures relating to the subject being taught.

13. Mark made no measurable academic progress attributable to his placement in the regular classroom. He did not participate in the regular curriculum, but was provided his own curriculum.

14. In less than three months of daily one-on-one instruction, Mark made great strides in learning to express himself on the communication board, devised by Carolyn Clement. In that time, Mark began to use the board to communicate spontaneously with adults and he was able to express three- or four-word sentences on the board.

15. Mark made progress when he worked with a private tutor. The tutor, Ms. Cathy Thornton, is a certified special education teacher with five years of current experience as a teacher of autistic children. She was retained by the H's to tutor Mark and to attempt to measure his level of functioning. She found Mark's attention span, when working in a comfortable, one-on-one setting to be much greater than that displayed in the classroom. Based on her work with Mark, she believes that he is not mentally retarded.

16. Mark learns best with one-to-one instruction, in a setting with minimal distractions. He needs to be learning skills that will help him to live an independent life in the

future. His primary educational need at this time is the acquisition of a communication system, by which he can express preferences and needs. Social skills, behavior management and academic skills are also important goals for him. Relative to his needs in these areas, Mark does not appear to need special attention to daily living skills. School system witnesses expressed concerns about Mark's ability in such skills as eating and dressing. These concerns are not reflected in Mark's IEP. There is no support for an inference that Mark is not doing well in these areas.

The school system demonstrated an intense and unexplained interest in Mark's eating habits. Its concern appears to have originated with the parents' decision to remove Mark from school during the lunch period and take him home for lunch. Its suspicions were fueled by the fact that Mark would return to school in the afternoon wearing a clean shirt, creating an apparent belief that his eating was so messy that he had to change his clothes. I remain at a loss as to why there were so many questions regarding Mark's eating habits and preferences. The evidence established that Mark is a somewhat finicky eater, who is highly sensitive to the visual and textural aspects of food that he is served. The uncontroverted testimony of witnesses who have observed Mark eat is that he uses a fork and spoon quite appropriately and is working on use of a knife. In any event, the school system has not proposed any goals related to eating skills as part of Mark's IEP. There is no evidence to support making this a part of Mark's IEP. For that matter, compared to Mark's other needs, daily living skills such as self-feeding and dressing do not appear to be priorities for Mark.

17. It cannot be determined how much progress Mark is capable of achieving. The answer to this question hinges on the acquisition by Mark of a system for communication.

18. Socially, Mark made some gains during the past year. He learned to tap a person's elbow lightly to get his or her attention. He learned to make certain wishes known through the use of his communication board.

ANALYSIS

The case presents two issues: 1) whether the proposal to remove Mark from the regular classroom violates the obligation of LCPD to educate him, to the maximum extent appropriate, with nondisabled children; and 2) whether the proposed placement is appropriate for Mark. Under the Individuals with Disabilities Education Act (IDEA), a child with a disability is entitled to a free appropriate public education. An appropriate education is one that is tailored to the unique needs and abilities of the individual child and is reasonably calculated to enable the child to receive educational benefits. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

IDEA also contains a requirement that states establish

> procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...."

20 U.S.C. sec. 1412 (5)(b); 34 C.F.R. sec. 300.550(b).

It is clear from the language of the statute that there is a strong presumption in favor of education of children with disabilities in the regular education environment, alongside children who are not disabled. This requirement has been known as "mainstreaming." The term "inclusion" is increasingly used to capture the essence of this requirement. Neither term appears in IDEA. For many individuals involved in education, the two terms bespeak certain philosophical or political differences as well as differing

assumptions and values. The philosophical debate embodied by the use of these two terms is not susceptible to resolution in a legal proceeding. I view these words as terms that have been adopted to discuss delivery of the IDEA requirement to provide special education and related services in the least restrictive environment. They are used in the following discussion to denote points on a continuum of educational services. The program advocated by the parents is referred to as inclusion, even though I do not understand them to advocate that every minute of Mark's day be spent in the regular classroom. The program advocated by the school system uses the term mainstreaming, even though I understand the mainstreaming component of its proposal to involve the inclusion of Mark in certain regular education classes and activities. Regardless of nomenclature, the legal question presented remains whether it is proper to remove Mark from the regular education environment to the degree proposed by the school system.

I. Does the proposal of LCPS to remove Mark from the regular classroom violate its obligation to educate him, to the maximum extent appropriate, with nondisabled children?

Courts have articulated slightly different standards to resolve the tension between the requirement for education in the mainstream with the requirement for specially designed education tailored to the unique needs and abilities of the child with a disability. In order to determine whether a school district is in compliance with IDEA's mainstreaming requirement, three circuits have adopted a two-part test first articulated in the case of *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989). See, *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993); *Sacramento City School District v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994). This test has not been accepted or rejected by the Fourth Circuit and it provides a logical framework for analyzing the problem. Under this analysis, the court looks first at whether education in the regular classroom with the use of supplementary aids and services, can be achieved

satisfactorily. Second, if the court finds that placement outside the regular classroom is necessary for educational benefit, it must then decide whether the school has mainstreamed the child to the maximum extent appropriate.

A) Whether the child can be educated satisfactorily in a regular classroom with supplementary aids and services.

In considering the first part of this test, whether the child can be educated satisfactorily in a regular classroom with supplementary aids and services, the courts consider several factors. They look at the steps that the school has taken to try to include the child in a regular classroom, a comparison between the educational benefits of the regular classroom and the educational benefits of the segregated, special education classroom, the effects of including the child on the regular classroom environment, and, in some cases, the cost of inclusion. Applying this analysis to the question of the appropriate education for Mark, I find that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily.

i) Reasonable effort to accommodate

In reaching this conclusion, I consider first whether reasonable efforts have been made to accommodate Mark in the regular classroom and I find that the efforts of this school system in this regard were reasonable. "The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad." *Daniel R.R.*, at 1048. Loudoun County undertook a serious effort to make full inclusion work for Mark. The principal placed Mark with a capable and willing teacher, and made modifications to the size and composition of the class. Ms. Johnson prepared the other students for Mark and succeeded in creating a peer environment of support and affection for Mark. She gave Mark extra instructional time and modified and adapted the second grade curriculum to address his needs and find an

instructional level and style that was appropriate for him. A full-time instructional aide, Ms. Leader, was hired to work exclusively with Mark.

Mary Kearney, the director of special education provided inservice training on inclusion, with reference to autism, to the personnel at Ashburn Elementary. Both Ms. Johnson and Ms. Leader were trained in facilitated communication, an augmentative communication system that Mark had been using in Illinois. In October, Ms. Kearney also insured that she and the members of Mark's team--i.e., the classroom teacher, the aid, the speech and language teacher, the principal, and the special education supervisor of the autism program--attended a full-day workshop on inclusion.

Mark received five hours a week of speech and language therapy from Ms. Carolyn Clement. Ms. Clement had previous training in facilitated communication and received advanced training for her work with Mark from an outside consultant on facilitated communication.

The group that worked with Mark identified as a team and worked diligently to formulate strategies that would enhance Mark's education. Although Mark's Illinois IEP did not provide for any special education services, LCPS added this component in February to provide more support for his education. With the February 1994 IEP, Ms. Virginia McCullough was added to provide consultation on curriculum modification and direct instruction three hours a week.

The parents contend that the school system failed to develop a behavior management plan to address Mark's troubling behaviors and that proper support in this area is crucial to mainstreaming or including a child like Mark. The record shows that, as early as October, Mark's challenging behaviors were identified as a potential problem. Frank Johnson was consulted at that time for assistance and the team was involved in devising ways to manage Mark's behavior. In February, Frank Johnson was added as a regular team member to meet weekly on issues of behavior. Although the parents have advocated for specific behavior management

strategies, the school system was not required to adopt any particular methodology. It was conscious of the importance of behavior management to Mark's success in the included setting and took reasonable steps to address his behavior.

In view of the fact that the school system provided training for the regular education personnel, hired a full-time aide, addressed behavior management issues, modified and adapted the curriculum, and increased services when the need became apparent, I conclude that the school systems efforts to provide supplementary aids and services were sufficient. The parents try to make much of the fact that school system personnel may have had some questions about the efficacy and feasibility of Mark's programming during the 1993-94 school year. I do not infer a lack of support from an ongoing assessment of the success of the current placement. I also do not credit the parents' assertion that LCPS began to withdraw support some time during the year. Midway through the year, services were added and his placement at Ashburn was continued by the Eligibility Committee.

ii) Compare educational benefits of regular classroom with educational benefits of segregated classroom.

The second factor to consider in determining whether Mark can be educated satisfactorily in the regular classroom is a comparison of the benefits of regular education with those of special education. Oberti, at 1216. Mark has not demonstrated the receipt of any educational benefit from education in an included setting. The only gains made by Mark were his progress on the communication board in speech and language with Ms. Clement and in his tutoring sessions with Cathy Thornton. It is clear that Mark learns best, and perhaps only, when he is being taught by a special education teacher in a 1:1 setting. Because it appears that Mark is, in fact, capable of academic progress (in which I include communication skills), the comparison of educational benefit is a very important part of this analysis.

In assessing the education benefit from regular education, the Fifth Circuit has looked at "the student's ability to grasp the essential elements of the regular education curriculum." *Daniel R.R.* at 1048. Working on his goals in the regular education setting does not promote achieving those goals. Mark's curricular goals are totally different from those of regular education students of his age. During class time, he was working on things that were totally different. He did not learn anything with the large group or in a small reading group or cooperative learning group.

Courts also look at nonacademic benefits, such as language and role modeling, in weighing the relative educational benefits of education in the regular education setting and special education in segregated setting. *Oberti*, at 1216; *Daniel R.R.* 874 F.2d at 1049. Mark did learn to follow certain classroom routines and to stay seated during group activities that did not place any demands upon him. However, his language needs are too pervasive for him to acquire any meaningful benefit in this area simply from being educated alongside nondisabled peers. The limited benefits that Mark has received from his experience in the regular classroom demonstrate the continued need for meaningful contact with nondisabled peers. However, the fact that he has received virtually no educational benefit in the included setting weighs heavily in the determination that he cannot be educated satisfactorily in the regular education classroom. Moreover, the limited social benefits received in the regular setting are fully available in the mainstreaming proposed for Mark at Leesburg Elementary School.

iii) Effect of inclusion on the teacher and on other children.

The third factor to be considered is the possible negative effect of including Mark in the regular education classroom. If the child's behavior is so disruptive that the education of other students is significantly impaired or if the child requires so much of the instructor's time as to cause the instructor to ignore the needs of other children, then the child cannot be educated in the regular classroom. *Daniel R.R.*, at 1049. The school's obligation to provide supplementary aids and services must be kept in mind in assessing the possible negative effect of the child's presence on the other students. *Oberti*, at 1217.

The efforts of LCPS in providing supplementary aids and services to accommodate Mark has been fully discussed and deemed to be sufficient. In spite of those efforts, Mark engages in very disruptive behavior. Accepting the view that these behaviors are communicative and are a direct result of Mark's disability, they are, nevertheless, disruptive and have a negative effect on the environment in the classroom.

Considered alone, the negative effects of Mark's placement in the regular classroom, might not be enough to justify removing him from the regular classroom, but they do come into the balance as a negative. Mark's vocalizations are continual throughout the day. Witnesses testified that last year he was kicking biting or hitting approximately three times a day. Although the children apparently learned to tune out some of this behavior, the daily disturbances do result in down time while the children are distracted and then redirected. Mark also presents some physical safety concerns. He is physically aggressive, involved in kicking, biting, pinching and hitting. It is not contended that Mark is mean or otherwise possessed of bad intent when he engages in these behaviors. But the result is the same for the classmate or teacher who is the recipient of these behaviors. He has tended to strike out at his teachers, who while slightly better able to protect themselves from his attacks, are reasonable in

perceiving some physical danger to themselves. Finally, Mark's full-time presence in the classroom demands a disproportionate amount of the planning and classroom time of the regular teacher.

To be sure, there are positive effects to having Mark in the classroom. Nondisabled children learn to accept and accommodate differences among people. This desirable effect certainly occurred in second grade. Ms. Johnson reported that the other students were fond of Mark and eager to be his partner. She stated that they were very protective of him.

Although I find Mark's presence in the classroom to be disruptive and the threat of his aggressive physical behaviors to be significant and daily, I do not believe that this factor, considered alone, would necessarily warrant excluding him from the regular education classroom. However, the negative effects of Mark's full-time inclusion in the regular education setting, considered with the efforts of the school system to provide supplementary aids and services and the absence of educational benefit to him from the setting, further support the conclusion that Mark cannot be educated satisfactorily in the regular classroom.

B. Whether the proposed program includes the child to the maximum extent appropriate

The second prong of the analysis is whether the proposed program includes Mark to the maximum extent possible. IDEA requires the school system to offer a continuum of services. "[T]he school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classed and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess." *Daniel R.R.* at 1050. The program proposed by LCPS provides for mainstreaming in all non-academic activities: art, music, physical education, library, and recess. This gives Mark a significant opportunity to

interact with nondisabled peers on a regular and daily basis, while receiving his academic instruction and related services in a manner from which he will derive educational benefit.

II. IS THE PROPOSED PLACEMENT APPROPRIATE?

A separate question posed, and one that must always be answered in any due process proceeding, is whether the proposed placement is appropriate. A placement is appropriate is it is reasonably calculated to provide educational benefit. *Rowley*, 458 U.S. at 206-207. I find that the self-contained autism class at Leesburg, with mainstreaming for art, music, library, physical education and recess, is reasonably calculated to provide educational benefit for Mark.

The parents contend that the self-contained program is not appropriate because its benefits, if any, are unproven. The proponent of a program or placement does not bear a burden of proving that it will be effective; rather, it must be proven that the proposed program or placement is reasonably calculated to provide educational benefit. The proposed placement offers a structured program with a ratio of 5 students (including Mark) to one special education teacher and an aide. The classroom has instructional materials suited to Mark's learning style and offers break activities, such as a swing, that will satisfy his sensory needs.

The parents have expressed concern about the value of the proposed mainstreaming. Through their witnesses, they have highlighted the challenges of mainstreaming in the relatively unstructured environments of recess and the so-called "specials"--music, art, library and physical education. Mindful of these concerns, I direct that the IEP reflect objectives for Mark related to his mainstream participation. In furtherance of this , I also direct that the IEP reflect a requirement that Mark is always accompanied by a teacher or an aide in the mainstream environments until such time as he can demonstrate an ability to be there independently. I also direct that the IEP reflect that he have his specials with the same regular education class. Mark has tremendous difficulty in adjusting to change.

Furthermore, he cannot hope to have meaningful social contact is he is moving through different groups of 25 students.

The school system must, of course, adapt the autism program to suit Mark's unique needs and abilities. It is Mark's IEP that must be implemented in this setting, not just that of a "typical" autistic child. The needs addressed must be his needs, not needs presumed to exist because he is autistic. The benefit of the setting for Mark is the opportunity to have his goals addressed through specialized instruction from trained education professionals in a structured setting, with a small student-teacher ratio. As reflected in Mark's IEP, his goals and objectives relate to the following areas; the acquisition of a means of communication and the development of language; improved interpersonal skills and replacement of inappropriate behaviors; academic growth in math and reading. Daily living skills are not part of his IEP and it is expected that they would be only an incidental part of his program under that IEP.

The parents also assert that the IEP committee was not free to act independently because of pressure brought to bear on its members by Mr. Ned Waterhouse, LCPS, Director of Pupil Services. This contention is based on a belief that Mr. Waterhouse expressed negative opinions about Mark's placement at Ashburn to various team members, all of whom were his subordinates. The only direct evidence of this was the testimony of Jamie Ruppman regarding remarks made by Mr. Waterhouse at a December team meeting. The fact that Mr. Waterhouse is married to Ms. Clement, the speech and language pathologist, is also advanced as evidence of pressure and an improper predetermination of placement. Regardless of Mr. Waterhouse's opinions and regardless of whether he expressed them to individuals responsible for making a placement decision on Mark, I do not find that he put pressure on the team. Each member of the team testified as to his or her own professional opinion as to what was best for Mark. Moreover, an IEP issued in March 1994, three months after

the alleged pressure, recommended continued inclusion at Ashburn, further negating any inference of undue pressure.

CONCLUSION

For the reasons stated above, I find that the proposed placement is appropriate and that it satisfies the IDEA requirement for education in the least restrictive environment. I direct that the IEP be modified to address goals and support for the mainstreaming components of Mark's placement.

Nancy A. McBride
Hearing Officer

December 14, 1994
as corrected
December 21, 1994

FILED
NOV 3 1997
CLERK

No. 97-586

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

MARK HARTMANN, a minor by his parents and next friends, Roxanna and Joseph Hartmann, and ROXANNA AND JOSEPH HARTMANN,

Petitioners,

v.

LOUDOUN COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's ruling in Hendrick Hudson School District v. Rowley, which sets forth the standard of judicial review of administrative proceedings in cases brought under the IDEA, should be modified to allow district courts to view the administrative proceedings as essentially irrelevant.

2. Whether the Fourth Circuit's reversal of the district court's decision, based on its conclusions that the district court misapplied the law and did not give due deference to the two decisions of the administrative hearings, was proper.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Loudoun County Board of Education, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners in this case.

STATEMENT OF THE CASE

A. Procedural History

The U.S. Court of Appeals for the Fourth Circuit, on July 8, 1997, ruled in favor of the Loudoun County Board of Education ("Loudoun"), reinstated the decisions of the administrative hearing officers and reversed the district court's decision of November 27, 1997, as being contrary to the law. This decision was the culmination of several years of proceedings.

This case originated with administrative proceedings brought under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA") [1] at the request of Loudoun on June 24, 1994. Loudoun requested a due process hearing to gain permission to implement an individualized education plan ("IEP") developed on May 31, 1994, for an autistic student named Mark Hartmann ("Mark"). A-5. The proposed IEP provided for a combined placement in regular education and special education classes at a regular elementary school. Id. Mark's parents refused to give consent for his academic instruction to take place in a special education setting. Id.

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[1] References in this brief to the IDEA will cite to the original version in effect at the time these proceedings were initiated rather than the reauthorized version of the IDEA which became effective on June 4, 1997.

Five days of local administrative hearings, which included the testimony of eighteen witnesses, were held from August 15, 1994 through October 27, 1994, under 20 U.S.C. § 1415(b)(2). The local hearing officer ruled on December 21, 1994, that Loudoun's proposed IEP offered Mark a free appropriate public education and ordered its implementation. A-47. Immediately following this decision, Mrs. Hartmann moved with Mark to Montgomery County, Virginia, and enrolled him in the public school system there. A-6. The Hartmanns have sought no educational services for Mark from Loudoun since that time. His education has been provided free of charge in Montgomery County, Virginia. The last IEP proposed for Mark by Loudoun was the May 31, 1994 IEP developed prior to Mark's removal.

The Hartmanns appealed the adverse decision of the local hearing officer to the state level. The state review officer on May 3, 1995, affirmed the decision of the local hearing officer, again finding that Loudoun's proposed IEP was appropriate. A-6.

The Hartmanns filed an appeal to federal district court pursuant to 20 U.S.C. § 1415(e)(3) on December 6, 1995. The district court granted a motion to dismiss Dr. Edgar B Hatrick, Superintendent, and Ned Waterhouse, Director of Pupil Personnel Services as defendants.[2] The district court denied Loudoun's motion to dismiss the case as moot due to Mark's relocation to Montgomery County, Virginia.

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[2] No appeal of the decision to dismiss defendants Hatrick and Waterhouse was made.

The district court received some additional evidence on September 8 and 9, 1996. The district court ruled on November 27, 1996, and by supplemental opinion dated December 16, 1996, that the administrative proceedings should be reversed and that a placement in regular education should be developed in anticipation of Mark's return to the Loudoun County Public Schools.[3] A-6.

On July 8, 1997, the Fourth Circuit ruled in favor of Loudoun finding that the district court's decision was contrary to law. The decision held that, contrary to the dictates of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), the district court impermissibly substituted its notion of educational policies for those of the school authorities (A-8), that the court impermissibly ordered an ideal education by "re-writ[ing] state teaching certification requirements in the guise of applying the IDEA" (A-14), and did not give due deference to the administrative proceedings (A-17).

B. Underlying Dispute

The essence of this case is an educational dispute arising in 1994 over the setting in which Mark was to spend a portion of his school day. Because no services have been

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[3] As represented to the Fourth Circuit, Mark's parents did not plan to seek his return to Loudoun prior to the Fall of 1997. As of this date, Mark still has not sought readmission to Loudoun.

sought by the Hartmanns from Loudoun since this time, there are no subsequent or current IEPs to be reviewed.

An IEP was developed for Mark by Loudoun in the Spring of 1994. This case was brought to resolve the dispute over the location in which Mark was to receive some of his academic instruction. Under both the Hartmanns' plan and Loudoun's plan, Mark was to attend a regular education elementary school, receive daily one-to-one instruction in speech and language, and participate with his regular education peers in art, music, physical education, library, lunch and recess. The plans differed over where Mark would receive his academic instruction for his content classes, such as language arts, mathematics, science and social studies. Loudoun wanted this instruction to occur in a special education class for autistic students and the Hartmanns wanted this instruction to occur in a regular class with the assistance of a one-to-one aide. A-5, 49.

Although Mark was entitled to remain in the Hartmanns' desired placement, the regular education class with a one-to-one aide, during the pendency of the administrative proceedings due to the stay-put requirement of IDEA (20 U.S.C. § 1415 (e)(3)), the Hartmanns chose to remove Mark from Loudoun's regular education class in December 1994. A-6. Mark was then enrolled in the Montgomery County, Virginia, Public Schools. The Hartmanns have not sought educational services or an IEP from Loudoun since December 1994 and believe Mark has been receiving a free appropriate public education.

In the petition to this court, the Hartmanns have abandoned their challenge to the appropriateness of Loudoun's proposed IEP, which was the sole issue which giving rise to the administrative proceedings. Their current claim is a technical challenge to the review standard used by the Fourth Circuit. This challenge is ironic because the Fourth Circuit determined that the district court failed to apply the correct review standard set out in 20 U.S.C. § 1415(e) and as interpreted in Hendrick Hudson School District v. Rowley, supra. The Fourth Circuit, however, correctly applied the law when it rendered its decision of July 8, 1997.

REASONS FOR DENYING THE WRIT

The Hartmanns request this Court's review based on their assertion that the Fourth Circuit applied an incorrect standard of review. On the contrary, the Fourth Circuit found that it was the district court which had misapplied the law as stated by this Court in Hendrick Hudson School District v. Rowley, supra. (hereinafter "Rowley"). The Hartmanns' claim is all the more bizarre because they specifically allege that the Fourth Circuit had applied the appropriate review standard in earlier cases decided by the Fourth Circuit under the IDEA. Petition at 11. Basically, the Hartmanns' assigned error involves "the misapplication of a properly stated rule of law." In such cases, review is rarely granted. Rule 10 of the Rules of the United States Supreme Court. These arguments do not warrant review by this Court. Accordingly, this case does not present any compelling or novel issues for review and the petition should be denied.

A. THE STANDARD OF REVIEW UTILIZED BY THE FOURTH CIRCUIT WAS IN ACCORD WITH ROWLEY AND WITH STATUTORY DIRECTIVES.

The IDEA provides that in reviewing administrative proceedings, the court must:

> (B) Additional requirements
> In any action brought under this paragraph, the court--
> (i) shall receive the records of the administrative proceedings;
> (ii) shall hear additional evidence at the request of a party; and
> (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. 1415(e)(2).

This Court has previously interpreted this statutory language in Rowley.

> We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases

> assure much if not all of what Congress wished in the way of substantive content in an IEP.
>
> Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Rowley, supra at 206-7.

In the case for which review is sought by this Court, both the local and state administrative proceedings resulted in decisions affirming the appropriateness of Loudoun's proposed IEP. No decision, including that of the district court, found procedural defects of any kind much less in the process by which Loudoun's proposed IEP was developed. Thus, the IEP calling for Mark's placement developed by Loudoun in accordance with proper procedures and

affirmed by the administrative proceedings was appropriate according to Rowley.

The district court's decision to reverse under these circumstances "set the state decisions at nought" and resulted in the impermissible substitution of educational judgment prohibited by Rowley. When there were no procedural defects found, Loudoun's decision as reflected in Mark's IEP should not have been set aside by the district court. There existed a difference in educational philosophies over how Mark should be educated. The district court failed to give due weight to these administrative proceedings.

B. THE FOURTH CIRCUIT DID NOT ESTABLISH A NEW STANDARD OF REVIEW.

The Hartmanns inaccurately portray the decision of the Fourth Circuit as requiring that "considerable deference" be given to the administrative proceedings. Petition at 6. This assertion misstates the entirety of the holding by the Fourth Circuit. The Fourth Circuit, began its legal analysis by citing both the relevant statutory review requirement of 20 U.S.C. § 1415(e)(2) and the language of Rowley which interpreted this language. A-7. The court noted, consistent with Rowley, that courts must give "due weight" to the state administrative proceedings. Id. The Fourth Circuit then determined that "[t]he district court's ruling strayed generally from the aforementioned principles." A-8.

In contrast, the district court's decision did not recite either the statutory or Rowley review standards. The Fourth Circuit concluded that the decision of the district court did "not reflect the teachings of Rowley" concerning the deference to be given to the administrative proceedings. A-10. While the Fourth Circuit Court at one place did reference "considerable deference", it is clear from the decision as a whole that this standard was no different from the "due deference" standard articulated by this Court in Rowley. Significantly, the Hartmanns concede that the Fourth Circuit had correctly applied the "due deference" standard in prior rulings of the court. Petition at 11. Thus, there is no reason to conclude a contrary or improper standard was applied in this case. A correct reading of the Fourth Circuit's decision does not reveal the application of an incorrect standard.

In actuality, it is the Hartmanns who argue for acceptance of a new standard which would give "reduced weight" to the administrative proceedings rather than the "due weight" required by Rowley. The Hartmanns concede in their petition that the district court "was compelled to reduce the weight to be given the administrative proceedings." Petition at 13. This acknowledgment of the application of an incorrect standard by the district court underscores the correctness of the Fourth Circuit's determination that the district court's decision was contrary to the law.

The Hartmanns argue in essence that no "due deference" should be give the administrative proceedings because the passage of time and other changes in Mark

"rendered the initial decision essentially irrelevant." Petition at 15. This argument, if accepted, would render meaningless the entirety of the administrative procedures set up under the IDEA. The resulting implication of accepting such an argument would be to encourage parties who lose in the administrative proceedings to delay appeals to court to the end of the limitations period and then argue that, due to the passage of time, any prior adverse administrative ruling is "essentially irrelevant." This result is not contemplated by either the statutory standard of review or by Rowley's instruction to give due weight to the administrative proceedings.

C. THE PETITIONERS CANNOT AVOID THE CORRECT APPLICATION OF ROWLEY BY ASSERTING THAT THEY WERE SEEKING PROSPECTIVE RELIEF.

The Hartmanns incorrectly attempt to distinguish their case from Rowley by characterizing their suit as one seeking prospective relief. This fictional distinction ignores the fact that this case, like most IDEA cases, concerns a challenge to the appropriateness of a school district's IEP. Thus, the circumstances are ordinary rather than exceptional and do not require the application of a separate review standard.

Rowley, furthermore, dealt with a request for prospective relief rather than for reimbursement. The issue in Rowley concerned whether interpreter services were required as part of an appropriate program. This request was in the nature of prospective relief. The review

standard announced in Rowley is thus applicable to this case. The Hartmanns incorrectly attempt to create a dual review standard depending on whether the relief sought concerns retroactive tuition reimbursement or the review of the student's IEP. This court has not established this dual standard. Mark's case, to the extent it sought prospective relief, is clearly akin to Rowley and requires the application of that review standard.

D. THE DECISION TO REVERSE THE DISTRICT COURT WAS BASED ON LEGAL CONCLUSIONS RATHER THAN ON FACTUAL DETERMINATIONS.

The final argument advanced by the Hartmanns for granting the petition is their assertion that the Fourth Circuit incorrectly reviewed the factual findings of the district court. According to the rules of this court, writs requested on this basis are rarely granted. Rule 10 of the Rules of the United States Supreme Court. Moreover, this argument overlooks the varied legal grounds given for reversing the decision of the district court.

The Fourth Circuit found that the district court's decision was contrary to law, which determination is not challenged in this petition. As recited previously, the Fourth Circuit concluded that the district court did not give due deference to the administrative proceedings. The district court basically reweighed the credibility of the opinions of the many experts who testified in the five days of administrative proceedings and whom it had not heard testify. This process was contrary to Federal Rule of Civil

Procedure 52(a) which requires that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Under these circumstances, the local hearing officer who heard five days of testimony served as the trial court. Presumably, the ability of the administrative hearing officer to hear live evidence while the district court only hears supplemental evidence provided a basis for the requirement imposed to give the administrative proceedings "due weight." The finding by the district court that witnesses it had not observed were not credible is contrary to established legal principles. See, e.g., Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1992); McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), *aff'd* 427 U.S. 160 (1976). The district court's decision was accordingly contrary to law.

Other grounds given by the Fourth Circuit for reversing the district court's decision were based on a determination that the decision was contrary to law. For example, the district court improperly concluded that Loudoun's teaching personnel were unqualified even though they met state standards for certification. The Fourth Circuit's decision found this conclusion to be contrary to law. "We can think of few steps that would do more to usurp state educational standards and policy than to have federal courts re-write state teaching certification requirements in the guise of applying the IDEA." A-14. The Fourth Circuit also concluded that the district court did not interpret the least restrictive environment and mainstreaming standards in accordance with case law. A-7 to A-11. These unchallenged legal conclusions of the Fourth Circuit provide further legal, as opposed to factual, support

for its reversal of the district court's opinion. Rather than a reversal based on a redetermination of facts, the Fourth Circuit reversed the district court's decision as being contrary to law. The narrow challenge by the Hartmanns to the Fourth Circuit's decision, while leaving unchallenged these significant additional legal conclusions, does not present a case worthy of review by this Court.

CONCLUSION

For the reasons stated above, the Loudoun County Board of Education respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
DEC 3 1997
CLERK

No. 97-586

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No. 97-586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARK HARTMANN, a minor by
his parents and next friends,
Roxanna and Joseph Hartmann,

ROXANNA AND JOSEPH HARTMANN,

Petitioners,

v.

LOUDOUN COUNTY BOARD OF EDUCATION,

Respondent.

**On Petition For a Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit**

REPLY TO BRIEF IN OPPOSITION

I. THE QUESTIONS PRESENTED ARE PROPERLY HEARD BY THIS COURT.

The Loudoun County Board of Education (hereinafter referred to as "Loudoun") incorrectly asserts in its Brief in Opposition that the Hartmanns have assigned error which involves "the misapplication of a properly stated rule of law". *Brief in Opposition at page 6.*[1] This assertion is without merit. The Hartmanns have assigned two errors. First, that the Fourth Circuit imposed a "rule of law" ("considerable

[1] References to Loudoun's Brief in Opposition will hereinafter be made as "BO" followed by the page number.

deference test") which differs in substance from all other circuits who have interpreted the statute and which improperly thwarts the will of Congress as unequivocally expressed in statute. In addition, the Hartmanns have asserted that this Court has previously rejected an equivalent test ("conclusive if based on substantial evidence") test. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 205; 102 S. Ct. 3034, 3050; 73 L.Ed. 690 (1982).

As fully discussed in the Hartmann's Petition for Writ of Certiorari, several Circuit Courts have reached quite different conclusions on the "rule of law" to be applied in these cases. These decisions span the gamut from the Fifth Circuit's "virtually *de novo*" standard, *Teague Independent School District v. Todd L.*, 999 F. 2d 127, 131 (5th Cir. 1993); to the "modified *de novo*" standard of the 10th Circuit, *Murray v. Montrose County School District RE-1J*, 51 F.3d 921, 931 (10th Cir. 1995); to the Fourth Circuit's "considerable deference" standard in the instant case. It is clear that this question involves a split in the circuits in the formulation of a "rule of law" not in the application of an accepted "rule of law."

Second, the Hartmanns have asserted that the Fourth Circuit failed to apply fundamental rules of law which govern the supervisory role of a court of appeals. Specifically, that the Fourth Circuit (1) failed to apply the long accepted rule of law that the factual findings of a district court shall not be overturned unless they are "clearly erroneous" and (2) that they failed to apply F.R.C.P. Rule 52(a) which requires that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Rule 10(a) of the Supreme Court Rules establishes that this Court favors the granting of a Writ of Certiorari where "a United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Upon consideration of these

factors it is appropriate that this Court grant this Petition for Writ of Certiorari.

A. The Fourth Circuit's rationale for rejecting the district court's findings of fact was not in accord with *Rowley*.

Loudoun asserts that the district court erred in setting aside the administrative decision because *Rowley* dictates approval of the proposed IEP where no procedural defects are found. BO-9. Loudoun's argument is based on a misreading of the *Rowley* decision. While this Court placed great emphasis on the procedural aspects of the *Individuals with Disabilities Education Act*, 20 U.S.C. Chapter 33, §§ 1400 *et. seq.*, (hereinafter "IDEA") it also required that the courts insure that the substance of the IDEA, a free appropriate public education, was in fact being offered the student. Once the courts have determined that there has been procedural compliance they must insure that the individual education program developed through the Act's procedures are "reasonably calculated to enable the child to receive educational benefits." *Rowley* at p. 206-207.

More to the point, this Court has clearly recognized that no presumption flows from an IEP unless the "mainstreaming" preference of the Act have been satisfied. This Court stated "When that 'mainstreaming' preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress." *Rowley* at p. 203. Pursuant to the IDEA the district court was required to decide whether the mainstreaming preferences of the Act had been met. The district court concluded that Loudoun's proposed placement failed to meet these statutory preferences. Under these circumstances, Loudoun's argument (that the district court should not have set aside Loudoun's decision because no procedural defect had been found) clearly misstates *Rowley* and is without merit.

B. The Fourth Circuit established an incorrect standard of review.

Loudoun argues that the Hartmanns have inaccurately portrayed the Fourth Circuit's decision as requiring that "considerable deference" be given to the administrative proceedings and that they have misstated "the entirety of the holding of the Fourth Circuit." BO-9. In fact, the Fourth Circuit stated

> while the district court opinion references the hearing officer's decision its failure to address the administrative findings noted above simply does not reflect the teachings of *Rowley* and *Doyle* that state proceedings ***must command considerable deference*** in federal court.

Emphasis added, A-10. Given the Fourth Circuit's use of this clear and unambiguous language, it is incorrect to argue that the Hartmanns have inaccurately portrayed the decision. The Hartmanns have done nothing more then attribute to this strongly worded directive its obvious meaning.

A fair reading of the Fourth Circuit's decision confirms that the court of appeals both articulated a "considerable deference" standard and then applied it to the present case. In applying the "considerable deference" standard the court of appeals criticized the district court for not addressing two minor factual findings; one contained in the local hearing officer's decision and one contained in the state reviewing officer's decision. A-9, 10. Certainly the "due weight" standard articulated by this Court in *Rowley* (at page 206) would not require that a district court decision be overturned for the failure of the trial judge to address minor factual finding contained in the administrative decisions. Unfortunately, in applying the "considerable deference" test, this is precisely what has occurred.

Perhaps the application of the "considerable deference" standard is best exemplified by the Fourth Circuit's summary dismissal of the extensive additional evidence heard by the district court. The extraordinary lack of attention to this evidence is consistent only with a legal standard that provides

that the state decision "must be given considerable deference" by federal courts.[2] Such a standard is a far cry from the statutory language which requires that the district court base its decision on a preponderance of the evidence which includes both the administrative record and the additional evidence heard by the court.

C. The Hartmanns have not argued for the acceptance of a new standard of review.

Loudoun argues that the Hartmanns have proposed a new standard by suggesting that the district court "was compelled to reduce the weight to be given the administrative proceedings." BO-10. This is a purely semantic argument with no merit. The Hartmann's argument that the weight given the administrative decision should be reduced based on additional evidence is thoroughly consistent with the "due weight" standard. Black's Law Dictionary defines the word "due" to mean "just; proper; . . . reasonable." It defines "due consideration" as "to give such weight or significance to a particular factor as under the circumstances it seems to merit, and this involves discretion." Clearly, the concept of "due weight" carries with it the explicit recognition that the district court will apply to the administrative findings only that "weight" which it reasonably deserves given the totality of the evidence. Given the significance of the additional evidence received by the district court, it properly applied the "due weight" standard when it found that the additional evidence carried greater weight than the administrative findings.

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[2] In practice the Fourth Circuit's application of the "considerable deference" standard is no different than the "conclusive if based on substantial evidence" standard rejected by this Court. *Rowley* at 205.

D. Post-hearing evidence rendered the administrative decision essentially irrelevant.

Loudoun criticizes the Hartmanns for arguing that the additional trial evidence concerning Mark's success in the Montgomery County (Virginia) School System rendered the administrative decision essentially irrelevant. BO-10-11. While the Hartmann's assertion may be strongly worded, it is accurate. The district court was lawfully presented with critical additional evidence which was not available during the administrative proceedings.[3] By statute the district court was required to reach its decision based on a very different set of facts than those available during the administrative proceedings. As a result, the administrative decision was rendered without the benefit of Mark's fifteen months of success in the regular education classroom. Reason and logic compels the conclusion that the administrative decision became essentially irrelevant because this critical evidence was not available.

This argument does not "render meaningless the entirety of the administrative procedures set out under the IDEA" as argued by Loudoun. BO-11. It simply acknowledges that Congress designed a system of legal review which ultimately vested the federal district court with the duty to receive the administrative record and additional evidence and to base its decision on a preponderance of that evidence. The instant case presents just one of many situations in which post-hearing evidence will be such as to require that the administrative decision be reversed.

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[3] In their appeal to the Fourth Circuit, Loudoun did not contend that any of the additional evidence heard by the district court was inadmissible.

E. The Hartmann's request for prospective relief is consistent with the statutory scheme established by the IDEA as interpreted by this Court in *Rowley*.

Loudoun argues that "[T]he Hartmanns incorrectly attempt to create a dual review standard depending on whether the relief sought concerns retroactive tuition reimbursement or the review of the student's IEP." BO-12. In fact no such dual standard of review has been proposed. What the Hartmanns have proposed is that the district court be permitted to apply the "due weight" standard in a manner consistent with the logic of the relief requested. This is precisely where the Fourth Circuit's imposition of a "considerable deference" standard falls short. It simply does not permit the district court to attribute "due weight" to the administrative decision. As the statutory scheme of review clearly provides, the district court must weigh the evidence and reach its conclusion on a preponderance of the evidence. This Court's decision in *Rowley* did not rewrite this statutory scheme and it certainly did not conclude that "the state proceedings ***must command considerable deference*** in federal court." A-10.

F. The Fourth Circuit failed to apply the requisite "clearly erroneous" standard with respect to the district court's findings of fact.

Loudoun argues that the Hartmann's assertion that the Fourth Circuit incorrectly reviewed the district court's findings of fact is not grounds upon which this Court should grant a Writ of Certiorari. BO-12. This argument is not well founded. The failure of the Fourth Circuit to employ the well established "clearly erroneous" standard coupled with its failure to follow F.R.C.P. Rule 52(a) establishes that in the instant case the Fourth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."

Loudoun attempts to cloud this essential reality by discussing *obiter dicta* found in the decisions of both the district court and the court of appeals. This is best

exemplified by the emphasis Loudoun placed on district court's discussion of the qualifications of the Loudoun professional staff and the response of the court of appeals. The district court found the professionals working with Mark lacked the experience and training to successfully integrate Mark in the regular education classroom. However, the court did not require that Loudoun provide any additional training or require additional licensing. Thus the discussion was nothing more than dictum; as was the Fourth Circuit's statement that "[W]e can think of few steps that would do more to usurp state educational standards than to have federal courts re-write state teaching certification."[4] A-14.

The essential finding of the district court was that Mark was receiving an appropriate education in a regular education classroom in another Virginia school system and therefore was entitled to be educated in a similar setting in Loudoun County. This was a factual finding based on evidenced which was properly received by the trial court. As such, the district court's finding of fact should not have been set aside unless they were clearly erroneous. The district court's findings were not clearly erroneous and the Fourth Circuit made no such conclusion. Thus, the failure of the Fourth Circuit to apply the "clearly erroneous" standard is grounds for this Court to exercise its supervisory powers.

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[4] There is simply nothing in the district court's opinion that suggests it was attempting to "re-write state teaching certifications." In fact, the emphasis the district court placed on the ability of Montgomery County School System to educate Mark suggests quite the opposite. The Montgomery County School System follows the exact same licensing standards and special education regulations as Loudoun. The district court clearly recognized that if one Virginia school system could meet Mark's needs in the regular education classroom so could and should another.

CONCLUSION

The questions presented by the petition filed herein address the fundamental issue of the role of the federal district court in cases filed pursuant to the Individuals with Disabilities Education Act. It is appropriate that this Court grant the petitioner's Writ of Certiorari.

Respectfully Submitted,

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